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ANOTHER NEW JUSTICE OF THE UNITED STATES SUPREME COURT.

Our highest court of last resort is changing its personnel at this time with unusual frequency. It is reported that the next Justice of the Supreme Court will be Hon. William R. Day of Ohio. He has been tendered, and has accepted, subject to confirmation by the Senate, an appointment, to the "highest judicial tribunal in the world." He will succeed Justice Shiras.

Mr. Day, besides being a lawyer of more than ordinary ability, has already proved in one of the crises of American history that he is also a statesman and diplomat of rare acumen and foresight. In 1897, upon the urgent solicitation of President McKinley, he became Assistant Secretary of State, and upon the breaking out of the Spanish-American war succeeded John Sherman as Premier of the Cabinet, which, during that trying time, he conducted with consummate skill and conservatism. Later Judge Day was appointed to succeed Judge Taft as a member of the Court of Appeals for the Sixth Circuit, when the latter was called to his position as governor general of the Philippine Islands. "Judge Day's appointment to the Supreme Court," says the *Ohio Law Bulletin*, "is a distinction well merited, and no question exists that the position will be filled with marked ability. He has held many important trusts, worked industriously and ably at every task assigned and accomplished each without pretension or self-glorification at his success therein. The appointment of two such men as Justices Holmes and Day indicates rare and wise selections for this most important tribunal, for which President Roosevelt is to be credited."

IMPORTANT AMENDMENTS TO THE BANKRUPT ACT.

The Bankruptcy Act of 1898 is generally conceded by those who are not opposed to such legislation in general, to be, with a few exceptions, the most perfect statute on this subject ever enacted. The few defects in the original draft which came out prominently in its practical administration were much debated in the public prints, and finally taken up by Congress, which,only a few weeks ago, passed a bill which, in many respects, materially amends the original bankruptcy act. The bill is now a law.

In the first place, the amended act opens the door to bankruptcy to mining corporations and to persons who, being insolvent, apply for the appointment of trustees or receivers of their property, or of whose property receivers have been put in charge.

Another provision of the original act which has been enlarged is that relating to discharges in bankruptcy. The following grounds for denying a discharge have been added: First, obtaining property on credit upon a materially false mercantile statement, made, in writing, within four months prior to the assignment; second, removing, destroying, concealing or transferring property with intent to hinder, delay or defraud creditors; third, instituting voluntary proceedings in bankruptcy within six years after a former discharge; fourth, refusing to obey any lawful order or answer any material question in bankruptcy proceedings.

Debts not affected by a discharge are increased by the inclusion of those arising out of wilful and malicious injuries to the person or property of another; those due or to become due for alimony or for the maintenance or support of a wife or child, and those growing out of certain actions for damages of a personal nature.

Another and probably the most important amendment is that relating to preferences. Over this provision in the old act there has been much bitter controversy, the consensus of opinion being that the former provision, under which those who had received payments on account from a person who within four months afterwards is declared a bankrupt, could not participate in the estate unless he surrendered the amount thus received, was unjust and inimical to the business interests of the country. This provision has now been so modified as to permit a creditor to retain the money thus received unless such previous payment was in fact fraudulent.

As far as procedure in bankruptcy is concerned the amended act makes several

minor changes. For instance, the appearance of the wife of a bankrupt may now be compelled in proceedings in which business transactions to which she was a party are concerned, or to determine the fact whether she was a party to any business of the bankruptcy. So also the bringing of actions is now permitted in courts other than those in which they could be brought by the bankrupt himself, the federal courts, for instance, having concurrent jurisdiction of suits to recover property which has been transferred fraudulently. The act also provides for increasing the fees of referees and trustees to an average of fifty per cent. over the fees allowed by the present law, and sternly prohibits any court in any case to allow a greater fee than that prescribed by law.

These amendments we regard as extremely conservative and yet sufficiently radical to meet all reasonable demands of those dissatisfied with the former act. With these amendments the bankrupt act of 1898 bids fair to outlive all other attempts at such legislation and should certainly satisfy all except the most chronic grumblers.

NOTES OF IMPORTANT DECISIONS.

ALIENS—ELIGIBILITY OF JAPANESE TO NATURALIZATION.—We have already discussed the subject stated at the head of this note in an earlier volume. (54 Cent. L. J. 421.) Our discussion was prompted by the inquiry of one, Takuji Yamashita a young Japanese student who applied for admission to the bar in the state of Washington. The supreme court of that state has just passed upon the application of this ambitious young foreigner, denying his right to admission because he was not a citizen of the United States nor subject to become such by naturalization. *In re* Takuji Yamashita, 70 Pac. Rep. 482.

The decision in this case turned on the right of a native of Japan to naturalization. In our previous editorial on this question, already referred to, we called attention to the obscurity and inaccuracy of terminology of our statute on naturalization, and, although we recogonized that the weight of authority seemed to deny the right of a native of Japan from acquiring citizenship in this country. We presented arguments which led us to reach quite a different conclusion. In this conclusion we believe we were fully borne out by the case of *In re* Rodriguez, 81 Fed. Rep. 337, the only case on this subject which bases its conclusions on anything but the most superficial reasoning.

The Washington case, however, after the manner of so many of our state courts, follows the line of least resistence—the "weight of authority"—and does not attempt to get below the surface of this most important problem and enter into a discussion of the historical and scientific meaning of one of the oldest and most important provisions of our federal statutes. The court alleges that there are four races: 1, the Caucasian or white race; 2, the Mongolian, or yellow race; 3, the Ethiopian or black race; 4, the Malay or brown race. Our statute on naturalization confers the right of naturalization on "free white persons," "aliens of African nativity," and "persons of African descent." From these premises the court argues: "It is plain that the two races mentioned are now eligible to citizenship under the general naturalization laws; that is, white persons and persons of African (negro) descent and nativity. It is clear that within the meaning of these words the applicant is ineligible."

The absurdity of a literal interpretation of this statute is evident. Contrary to what the court says in this case, a person of any race under the sun may be naturalized under this statute, if a literal construction is to be followed. One class of persons having the right of naturalization are "persons of African nativity," *i.e.*, persons born in Africa. Under this provision, persons of any race or color, Chinese, Malay, or Negro, have an unassailable right to become American citizens. The only condition is that they shall have been born within the borders of the dark continent. The word "African" has certainly no ethnological meaning; the term is purely a geographical one, and offers a convenient opportunity for aliens of all races who may desire for their children the boon of American citizenship.

The objection made to this argument is that it should be addressed to Congress, not to the courts. This objection would be well taken were it not for the fact that a perfectly reasonable construction of this act will completely obviate all its apparent absurdities. Under this construction, persons of any nation or race, except the Chinese, who are excluded expressly by statute, may be naturalized upon showing the requisite moral and mental qualities. For a full discussion of this phase of this question see *In re* Rodriguez, 81 Fed. Rep. 337, and 54 Cent. L. J. 421.

CARRIERS—RIGHT OF PURCHASER OF COMMUTATION TICKET TO FREE PASSAGE WHEN HE FAILS TO PRODUCE HIS TICKET ON THE TRAIN. — The fact that trial juries, on general principles, like to give a railroad company the worst end of the law is well illustrated by the recent case of Southern Railway Co. v. De Saussure (Ga), 42 S. E. Rep. 478. In this case a purchaser of a commutation ticket good for fifty-four trips, lost it after only a few of the trips had been punched on his ticket. He applied to the railroad company for a duplicate, or at least for the privilege of taking the trips to which he was entitled under the ticket. The railroad company refused to grant either request, claiming that the

purchaser of the ticket was bound by the conditions printed thereon, one of which read that the purchaser would have no claim for rebate on account of the nonuse of the ticket from any cause, and another that the ticket must be presented to the conductor on every trip. The purchaser of the ticket brought suit and recovered a judgment for $6.50, the value of the ticket at the time it was lost, with $25.00 attorney's fees and the costs of suit.

On appeal to the Supreme Court the judgment was promptly reversed. The court said: "Under the conditions attached to the issuance of the lost ticket, the plaintiff was not entitled to have refunded to him any sum for the unused parts of the ticket, nor any sum which he may have paid out for transportation during the time covered by the ticket. The stipulation that the ticket was to presented to the conductor on each trip, was equally binding as a part of the contract, and if the plaintiff was not entitled to be transported until, as a condition precedent, he had exhibited his ticket, then whether such failure was attributable to the fact that the ticket had been lost, or to other causes, is in no sense material; for by his own agreement he was only excused from paying his fare when he exhibited a ticket showing his right to be transported without such payment."

The decision in this case is supported by the authorities. Thus, Judge Thomson says: "Passengers riding upon commutation tickets are bound strictly by the terms of the contract embodied in such tickets." 5 Thomp. Neg., § 2625. When a commuter left his ticket at home by mistake, and refused to pay full fare when demanded, it was held that the conductor could eject him from the train at the next station. Downs v. Railroad, 36 Conn. 287; Crawford v. Railroad, 26 Ohio St. 580. The case of Ripley v. Transportation Co., 31 N. J. Law, 388, is quite similar to the principal case mentioned. This was a suit for damages for refusal to permit plaintiff to ride free where he had lost a commutation ticket entitling him to so many trips. The court said: "It is argued that, the ticket being lost, the plaintiff should be permitted to prove its contents as in the case of other lost instruments. But nobody objects to that; that is not the difficulty. The difficulty is that upon proving the contract it appears that, by the terms of the instrument, the plaintiff has lost the privilege of a free pass. * * * The defendants agreed that the plaintiff might travel for a fare, which is not alleged to be the full fare the law allowed, and the defendants had a right to impose such conditions as they saw fit; and they saw fit to prescribe, as a condition, that the plaintiff should show his ticket, and this he agreed to. He thus became his own insurer that he would not lose his ticket. If he did not like that contract, he should not have entered into it. But, having entered into it, he is bound by it as much so as the company are to carry him if he does show his ticket."

INTOXICATING LIQUORS — EXEMPTION OF "CONGRESSIONAL RESTAURANTS" FROM THE OPERATION OF LICENSE LAWS OF THE DISTRICT OF COLUMBIA.—One does not have to be too easily excited into mirth to see considerable humor in the recent case of Page v. District of Columbia, decided recently by the Court of Appeals of the District of Columbia and reported in the 30 Wash. Law Rep. 758.

It appears that the District of Columbia has quite a restrictive law, passed by Congress for the regulation of the sale of intoxicating liquors. It appeared, however, in the case to which we have alluded, that there are two restaurant keepers in the Capitol building, one on the side occupied by the House of Representatives and the other on the side occupied by the Senate, who are accustomed to sell, among other substantial and liquid refreshments, all kinds of intoxicating liquors, as they alleged, "for the delectation and convenience of the members of Congress." The public also were admitted if they paid the price. These honored vendors of exhilarating beverages considered themselves above the law by reason of the fact that they served the supreme legislative authority of the country, and that their places were conducted under the direction of certain committees, one, a committee of the Senate, and the other, a committee from the House of Representatives.

This condition of affairs existed for some time when some astute prosecuting attorney arose, who, failing to see what added dignity or superior privilege a congressional grog-shop had over any other kind, instituted a prosecution against the two gentlemen occupying the exalted position of bartenders to congress, charging them with selling intoxicating liquors in violation of law. Upon their conviction in the police court, the two gentlemen appealed to the Court of Appeals of the District of Columbia which reversed the judgment of the lower court and held that the act of Congress, regulating the sale of intoxicating liquors within the District of Columbia, was not applicable to the congressional restaurants, on the ground that they were located and conducted in the Capitol building, under the rules and regulations of congressional committees, for the use and convenience of members of Congress. The court gives reasons for its decision in the following language:

"The various provisions of the statute are indicative of the intention of Congress in the passage of the act. There is no word or sentence in the act to show that there was any express or definite intention on the part of Congress to include within its provisions the restaurants in the Capitol, and thus to modify the rules of the Houses of Congress and to transfer the regulations of the restaurants from the committees of the Houses of Congress to the agents and officers of the municipal government of the District of Columbia, so far as the right and privilege of selling intoxicating liquors may be concerned. As

we perceive from the provisions of the statute cited, large powers and discretion are delegated to and conferred upon the excise board, both as to the qualification of the applicant for license and over the place for which license may be granted or refused. It is contended, however, that, as the Capitol restaurants are located and carried on within the district, and there being no express exception of them from the operation of the statute, upon the very broad and comprehensive terms employed in the act, they are embraced and made subject to license. But these restaurants are, by the rules to which we have referred, placed under the control and regulation of the respective committees of the Houses of Congress, and are conducted primarily for the use and convenience of members; and the defendants, the keepers of the restaurants, are *quasi* agents or officers of the respective houses. And while it is entirely competent to Congress to subject these restaurant keepers to license by a general license law for the entire district, yet to do that would require an express declaration of such purpose on the part of Congress, or such ground apparent in the provisions the law as would warrant a clear implication of the intention of Congress to impose the license; and the warrant for such implication we think entirely absent from the act of 1893, Ch. 204. By no other means would it be proper to infer that the two Houses of Congress intended to modify or restrict their respective standing rules, and withdraw from their committees the general power of regulation conferred, with respect to the sale of liquor in the restaurants. Indeed all the provisions of the act would appear clearly to negative the contention that the act was intended to apply to the congressional restaurants in the Capitol. These restaurants have been in use and operation for nearly half a century, Congress having provided rooms for them; and it is agreed that they are kept primarily for the use and convenience of the members of Congress. The modern definition of a restaurant is, "An establishment for the sale of refreshments, both food and drink," Cent. Dict,; or, according to another definition, — "a place for refreshment; a house where liquors and cooked food are sold." Encyclopaedia Dictionary. The restaurants in the Capitol have been conducted according to these definitions from their origin, as shown by the actions of the different Houses of Congress. Several efforts have been made from time to time to restrict or prevent the sale of intoxicating liquors in the restaurants of the Capitol, but they have not been successful, and we think if it had been the intention of Congress to embrace these restaurants in the provisions of the act of 1893, Ch. 204, it would have been so expressly declared."

To our mind this decision appears in no other light than ridiculous. Is Congress exempt from obedience to its own laws? Could a member of Congress after participating, for instance, in a vote to make drunkenness a crime, get in that condition himself and claim immunity from punishment? And while we recognize the right of Congress to say that no one in the District of Columbia shall have the right to get drunk but themselves, we believe that a court should hesitate very long before construing an act which is alleged to have such a ridiculous meaning.

In the present case Congress has said, by statute, that *every* seller of liquor in the District of Columbia shall be subject to certain regulations. The law makes no exceptions. If Congress wanted to grant special privileges for the sale of liquor to any particular parties, they should have made that distinction plainly evident by public and formal provisions in the statute itself. There is no provision of the constitution which places committees or members of Congress above the operation of their own laws, and instead of a presumption existing that the sale of intoxicating liquors, sold under the supervision of congressional committees, is above the operation of any law enacted on that subject by Congress, just the contrary presumption should be indulged, and an act of Congress presumed to apply equally, and without favor, to all persons coming within its operation, unless special immunity is granted by the plain words of the statute itself.

CAN AUTHORITY BE DELEGATED TO NOTARIES PUBLIC TO PUNISH FOR CONTEMPT.

Authority to punish for contempt is a power which many of the states of the Union have sought by legislative enactment to confer upon notaries public. In the absence of statutory legislation granting this right, unquestionably no such authority can be thought to exist; and the usual constitutional provisions of the different states, limiting judicial powers to certain stated tribunals, have raised grave doubts in the minds of many of the higher courts, as to the power of the legislatures to confer upon the notaries public this high prerogative. The constitutionality of such statutes becomes a matter of great interest. The universal character of the notary public, their almost unlimited number, their practical value and wide importance as executive officers in the commercial world, and the ease with which appointment to the office without special qualification or merit, may be secured, renders the question of clothing them with high and arbitrary powers so closely touching the rights of citizenship a very serious one. The power to punish for contempt certainly falls within this last head. It has been well said to be the very highest right

resting in the judiciary. This power, in courts to inflict punishment for contempt, is coeval with their creation and indispensable to their continuation. It is *sine qua non* to their existence, and an inherent right in the judicial system. A right not dependent upon statutory legislation, but existing from the common law. The venerable Sir Wilmot, in the opinion in the case of King v. Almon,[1] speaks of it as being as ancient as the common law itself; no traces of vestiges of its intrduction can be found, and it stands upon the same immemorial usage as supports the whole fabric of the common law. It is true, that, perhaps, in all the legislatures of the country, laws have been enacted defining the power, but these are merely declaratory; the right itself exists from time immemorial.[2] It is the supremest right vested in the courts, and is a function of the judiciary solely. It is organic. It attaches not to the man, not to the person of the judge, but to the judicial seat to which he may be elevated. Thus, under the older dispensation of the common law, the affront must have been committed while the court was actually clothed with the insignia of his office and seated upon the bench. And while the statutory systems, incident and necessary to the administration of increasing commercial demands, have, to some extent, widened the contempt jurisdiction of the courts, it is nevertheless, still the wise policy of the law to guard most jealously the distribution of so dangerous a power. It is still confined exclusively to the judiciary, save in a very few instances, chiefly, where legislative bodies, by reason of the high trusts committed to them, are permitted to assume for their own protection, the functions of judicial organizations.[3]

Contempt is a mere crime, and its punishment dependent entirely upon an adjudication of guilt, an adjudication based upon a trial by some proper tribunal of the facts and merits of each particular case. A person cannot be summarily subjected to punishment for contempt without an opportunity to exonerate himself.[4] There must be a judicial conviction of guilt upon a showing of facts sufficient to rebut the legal presumption of innocence, which obtains here as in other charges of crime. It is the province of courts alone to adjudicate questions of law and fact and to inflict penalties for the violations of laws. Punishment for contempt is merely the infliction of a penalty for an offense.[5] And it is peculiarly the province of the particular tribunal seeking to inflict the penalty for contempt, to adjudicate the questions of law and fact. Where jurisdiction exists, it is an action which cannot be reviewed by other courts; there can be no appeal. This is a proposition too well established to call for a citation of the very numerous authorities. It has always been the law. As early as the reign of James I., Sir Edward Coke, that stalwart champion of the common law and of the court of Kings' Bench, in its struggles against, the courts of chancery, was driven to concede that in matters of contempt, he could not interfere even by *habeas corpus*. The cases which forced from him such an admission are ably reviewed in Yates v. Lansing.[6]

Can notaries public exercise these high functions of the judiciary? Unquestionably they cannot in the absence of specific statutory authority. No such right existed under the common law. Can they be vested with authority to do so by legislative enactment, in commonwealths where the usual constitutional provisions limiting judicial powers prevail? In states where this question has been discussed, it appears that the constitutional limitations are singularly uniform. The usual provision is to the effect that the judicial powers of the state shall be limited to certain courts, naming them, "and such other courts as may be created by the legislature," the authority of the legislatures being thus specifically limited in the granting of judicial powers, to the creation of courts.

It is the great concurrence of authority that the mere appointment of a notary public is not in any sense the creation of a court, he being merely an executive officer. The question of whether or not the legislature may vest such an executive officer with this judicial power, is one which has given rise to more discussion, and to some extent perplexed the courts. The granting of any judicial authority to executives has generally been looked upon with disfavor, though in some instances

[1] 8 St. Tr. 53.
[2] U. S. v. Hudson, 7 Cr. 32.
[3] This is discussed at great length in the now celebrated case of Killbourn v. Thompson, before the Supreme Court of the United States, 103 U. S. 190.
[4] Smith v. Tenney 62 Ill. App. 571.
[5] Note to Clark v. People, 12 Am. Dec. 177.
[6] 6 Am. Dec. 290.

it has been sanctioned by the courts, chiefly in cases where it was peculiarly necessary to the office thus endowed. The matter has been frequently reviewed. The constitution of the state of Massachusetts is to the effect above quoted, and the question arose there in Whitcombs case,[7] as to whether or not a city council had power to punish for contempt, upon a witness refusing to answer in an investigation pending before the council. The statute had undertaken to confer the power, but was held to be ineffectual. Judge Gray, in discussing the matter, said that under the common law a city council had no such power, and that when the constitution of the commonwealth of Massachusetts was adopted, it was not part of the law of the land that municipal boards or officers had power to punish for contempt. It was therefore held that they were not to be regarded as part of the judiciary, and that a statute which undertook to confer such authority upon them was unconstitutional and void. That it was not within the contemplation of the people in providing in their constitution for the creation of courts. In Langenberg v. Decker,[8] the learned judge, discussing the question, says: "The authority to imprison resides where the constitution places it, and the legislature cannot give it residence elsewhere. The authority is essentially a judicial one abiding in the courts of the land. As it is a judicial power, it is not created by the legislature nor vested by that body. * * * Judicial power, like all sovereign powers, comes from the people, and vests where the people's constitution directs that it shall vest. The legislature may name tribunals that shall exercise judicial power, unless the constitution otherwise provides, but the power itself comes from the constitution and not from the statute." The English rule is very different. The British parliament has supreme and uncontrolled power, and may change the constitution of England, and repeal even Magna Charta, which is itself only an act of parliament.[9] But this is not true of the commonwealths of America.[10] Here the constitution, as the voice and will of the people, is more potent, and above, not only the common law, but the legislature also, controlling all tribunals and all departments of the government alike; it is a safeguard of individual rights, which cannot be invaded or suspended by enactments of the legislative bodies.

The specific question of the rights of notaries public to punish for contempt has often been raised in cases submitted to the appellate courts of the country, and, where legislative authority exists, it has been many times sustained. Noticeably in the cases: *In re* Abeles,[11] *Ex parte* McKee, *Ex parte* Mallinkrodt, and others, but it does not appear that in these cases the constitutional phase of the question has received any attention. *In re* Abeles, the case most frequently cited, has been subsequently overruled by the Kansas court.

The question of the constitutionality of such statutes, however, has received some attention, most prominently perhaps by the Supreme Court of Kansas in the case *In re* Huron.[12] In this case the court, after a very full and comprehensive discussion of the constitutional phase of the question, and an exhaustive review of the authorities, comes to the conclusion that under a constitution whose provisions are substantially to the effect above quoted, any attempt by legislative enactment to confer upon a notary public authority to punish witnesses for contempt upon their refusal to obey his subpoena, or upon their refusal to be sworn, or to answer the questions propounded, is unconstitutional for the reason that the power to so punish is judicial and cannot be vested in a notary. The court in discussing the question among other things says: "It will be observed that the power is lodged in courts alone. Until a tribunal is created which rises to the dignity of a court, it cannot be vested with judicial powers. A notary public is not a court in the sense in which the term is used in the constitution. * * * He is simply an executive officer, chosen with reference to the duties to be performed by officers of that class. * * * The general authority conferred is to take proof and acknowledgment of deeds, protest paper, etc., * * * and to exercise such other powers and duties as by the law of nations and commercial usage may be

[7] 120 Mass. 118.
[8] 131 Ind. 486.
[9] Emery's Case, 107 Mass. 172.
[10] Powers & Wyckoff v. Bergen, 6 N. Y. 358; Kilbourn v Thompson, 103 U. S. 190.
[11] 12 Kan. 451; 18 Mo. 599; 20 Mo. 493, and others.
[12] 58 Kan. 152, 62 Am. St. Rep. 614.

performed by notaries public. His duties, including the taking of testimony by deposition, are not judicial in their character; he simply writes and authenticates the testimony given with such objections as the parties may make; in the commercial world a notary has not been regarded as a judicial officer. He is not designated as a court nor clothed with the usual paraphernalia of such a tribunal. No rules are prescribed for a trial before the notary, nor is any specific provision made for obtaining evidence in order to determine whether the witness is actually guilty of contempt. Up to the time of the refusal of the witness, at least, the notary is only an executive officer exercising executive powers. There is no such thing as a punishable contempt of executive authority. While an executive officer might be constituted a court, judicial powers cannot be conferred upon him as merely ancillary to the exercise of purely executive power." This is probably the fullest discussion of the question which appears in the reports.

A contrary doctrine, however, appears to prevail in Ohio. In that state the constitutional phase of the question arose in the case of DeCamp v. Archibald,[13] and the court held that an act of the legislature vesting notaries public with this power is not unconstitutional. Other questions, however, are here considered, and the court appears to rely for its authority in determining the constitutionality of such provisions, upon the case of *In re* Abeles by the Kansas court, which has been subsequently overruled,[14] and Dogge v. The State, by the Supreme Court of Nebraska, referred to below. This rule has since obtained in Ohio, in its lower courts, but it does not appear that the question of the constitutionality of the law has been again considered.

In the Supreme Court of Nebraska the matter is again raised in the case of Dogge v. The State,[15] but unfortunately the exact question of the constitutionality of the law is waived by the court. In that case the court rather decides the point upon one of the principles announced by Judge Gray in Whitcombs case, *supra*, *i.e.*, that this statute, in Nebraska, giving to notaries the power to punish for contempt, was in full force and effect at the date their constitution was adopted. This constitution contained the clause: "All existing courts which are not in the constitution specifically enumerated, and concerning which no other provision is herein made, shall continue in existence and exercise their present jurisdiction, until otherwise provided by law." The law authorizing imprisonment of a witness for refusing to testify or give a deposition before a notary, and also the law creating the office of notary public, with the powers and duties thereof, were in force at the time of the adoption of this constitution. And the constitution, by specific provision, "continues in force," the law conferring judicial powers which were in force at the time of its adoption, in the "exercise of their present jurisdiction until otherwise provided by law." And the judge, in rendering the opinion in the case, reverts particularly to this, and states that a determination of any other question is unnecessary.

A notary borrows no judicial power, in the taking of depositions, from the dignity of his employment or the necessities of the case. He remains a ministerial officer.[16] Yet there must be an adjudication; there must be an exercise of the judicial function by the officer seeking to inflict the punishment for contempt. Thus, if this power to punish for contempt is to be delegated to notaries, they must at the same time be vested with the right of judicial trial and adjudication; a discretionary jurisdiction over the individual liberties of citizens. Can it have been within the contemplation of the people, in framing their constitutions, that such an arbitrary power should be vested in an executive officer of the character of the notary public? If not, then any attempt on the part of the legislatures to so endow this office, in states where these constitutional limitations prevail, must be held invalid.

It has been sometimes contended that a notary in taking the testimony of witnesses goes armed with a commission of authority from a court who has the power to compel obedience, and becomes an officer of that court, and is, therefore, clothed with authority to enforce his orders by punishment for contempt. This view, however, is not sustained by any serious authority. A sheriff is also so armed, yet he remains, nevertheless, a mere executive officer. No court can delegate its judicial authority.

The present federal practice seems to recognize the principle, and it is the opinion

[13] 50 Ohio St. 618.
[14] *In re* Huron, *supra*.
[15] 31 N. W. Rep. 929.
[16] Courtnay v. Knox, 48 N. W. Rep. 763.

of the court in *Ex parte* Doll[17], that congress under the present United States constitution, which is to the effect above quoted, has no authority to invest a commissioner with power to punish for contempt.

It appears to be beyond the authority of the legislatures to grant any such power to notaries public.[18]

WACO, Texas. BEN KENDALL.

[17] 7 Phila. 595.
[18] Chandler vs. Nash, 5 Mich. 409.

SELF-DEFENSE — EVIDENCE OF DANGEROUS CHARACTER OF DECEASED.

STATE v. ELLIS.

Supreme Court of Washington, December 6, 1902.

Where defendant claimed self-defense, instructions that deceased's threats to kill defendant would give him no right to kill deceased unless deceased had just before the killing committed some overt act to carry out such threats, and that evidence as to the dangerous character of deceased could not be considered unless the jury found that deceased had made an attack on defendant, were erroneous because requiring the jury to find a real, and not an apparent, danger.

REAVIS, C. J.: Defendant was charged in the superior court of Kittitas county with murder in the first degree, and he was convicted of manslaughter. At the trial the fact of the homicide was admitted. The plea of self-defense was interposed by the defendant, and this was the only issue tried. Evidence was given tending to show that deceased had the general reputation of a dangerous, quarrelsome, and fighting man; that he had before threatened to kill defendant; that such reputation and threats were known to defendant before the shooting, and that deceased had several times made such threats to defendant; that on the day of the homicide, and a few hours prior to its occurrence, deceased challenged defendant to settle their dispute "by shooting it out;" that at the same time he held a pistol in his hand, and that defendant at the time kept deceased "covered" with a pistol. Witnesses were produced by defendant who testified to the general reputation of deceased, and, as the record here shows, the following question was propounded to each: "Do you know the general reputation of deceased, during such times, in such communities, as to being an aggressive, quarrelsome, dangerous, fighting man, and, when engaged in quarrels and fights, his reputation and his habit as to using firearms and other deadly weapons?" Objection was sustained to the following portion of the question: "and, when engaged in quarrels and fights, his reputation and his habit as to using firearms and other deadly weapons." The question, as amended, was then answered by each witness, "Yes." The following question was then propounded by defendant to each of said witnesses: "What was that reputation, good or bad?" To which each of said witnesses answered, "Bad." The following question was then propounded by defendant's counsel to each of said witnesses and to defendant: "Do you know the general reputation and the habit of the deceased, during the times and in the communities you have stated, as to resorting to the use of firearms and other deadly weapons when engaged in quarrels?" To which question the state by its counsel objected, and such objection was sustained by the court. The defendant testified that just preceding the shooting deceased accosted him with threats, and "spit in his face," and made a gesture as if to draw a pistol. The court, at the request of counsel for the state, gave the following instructions: "1. I instruct you that if you believe from the evidence that deceased threatened to take the life of the defendant prior to the alleged killing, that this would give the defendant no right to take the life of the deceased, unless you further believe that at the time of the alleged killing the deceased was making or immediately preceding the killing had committed some overt act towards carrying such threats into execution. 2. I instruct you that the evidence respecting the dangerous character of the deceased can only be considered by you in the event of you finding from the evidence that deceased was making or had made, immediately preceding the alleged killing, an attack upon the defendant of such a character as would justify the defendant in using deadly weapons in repelling the same."

The defendant assigns as errors the rejection of the evidence of the reputation of deceased for, and his habit of, using firearms and deadly weapons in quarrels and fights, and the giving of the two instructions set out above, and also misconduct of a juror. It is urged by counsel for the state that a proper foundation was not laid for the introduction of the evidence relating to the reputation of the deceased for carrying and using weapons in his quarrels, in that it was not shown that defendant knew such reputation and habit. But the objection to the question was general, and not merely to the order of the introduction of proof. It may also be observed that such evidence may tend to enlighten the jury as to who was the aggressor in the rencounter. State v. Cushing, 14 Wash. 527, 45 Pac. Rep. 145, 53 Am. St. Rep. 883.

It is readily perceived that the real issue at the trial was, did the facts as they appeared to the defendant at the time of the homicide justify an ordinarily prudent man in believing he was in imminent danger of death or serious bodily injury? If they so appeared to the defendant, he was excused for the commission of the homicide. The right of self-defense permits one to act honestly upon the apparent danger to which he is exposed at the time. It seems that evidence of the habit and reputation for carrying and using deadly weapons may be received where the nature of the defense indicates that the defendant had reason-

able apprehensions of great danger to his person, and they are pertinent for the same reason that general reputation of bad character and threats uttered by the deceased are received. The rule is well stated in Quesenberry v. State, 3 Stew. & P. 308, as follows: "If the killing took place under circumstances that could afford the slayer no reasonable grounds to believe himself in peril, he could derive no advantage from the general character of the deceased for turbulence and revenge. But if the circumstances of the killing were such as to leave any doubt whether he had not been more actuated by the principle of self-preservation than that of malice, it would be proper to admit any testimony calculated to illustrate to the jury the motive by which he had been actuated." It is also very generally approved: Horbach v. State, 43 Tex. 242; Daniel v. State, 103 Ga. 202, 29 S. E. Rep. 767; State v. Graham, 61 Iowa, 608, 16 N. W. Rep. 743; Payne v. Com., 1 Metc. (Ky.) 370; Moriarity v. State, 62 Miss. 654; State v. Elkins, 63 Mo. 159. The defendant's testimony made the evidence tendered relevant and material. State v. Cushing, 14 Wash. 527, 45 Pac. Rep. 145, 53 Am. St. Rep. 883. It is suggested by counsel for the state that ample testimony to the reputation of the deceased as an aggressive, quarrelsome, dangerous, fighting man was introduced, and that the exclusion of the evidence relating to his reputation and habit of carrying and using deadly weapons when engaged in quarrels was inconsequential, and worked no prejudice to defendant. But it is apparent that a man who habitually carries and uses such weapons in quarrels must cause greater apprehension of danger than one who does not bear such reputation and does not have such habits. The vital question is the reasonableness of the defendant's apprehension of danger, and his good faith in acting upon such apprehension. The jury are entitled to stand as nearly as practicable in the shoes of defendant, and from this point of view determine the character of the act. The exclusion of the evidence tendered in this regard was error.

The general instructions given by the court stated fairly the law of self-defense, but the two set out above and objected to by defendant are defective and misleading. It is the imminent apparent danger, not real, the jury must find to excuse the homicide. The two instructions taken together require the finding by the jury of a preceding attack or overt act, at the time, before the dangerous character and threats of the deceased can be considered. On the contrary, the apparent facts should all be taken together to illustrate the motives and good faith of the defendant at the time of the homicide. As a new trial must be awarded for the two errors discussed, and it is not probable that the controversy over the misconduct of the juror will arise again, and as the last error is assigned upon the facts shown by somewhat conflicting affidavits, such error need not be further noticed.

NOTE.—*Evidence of Turbulent Character of Deceased for the Purpose of Establishing the Fact that Defendant had a Reasonable Apprehension of Danger.*—The best and most authoritative definitions of character are undoubtedly those given by the Century Dictionary. There are two distinct ideas connected with the expression "character" as relating to the moral qualities of an individual that must be carefully borne in mind in discussing this subject. In the first place, character is defined as "the combination of properties, qualities or peculiarities which distinguishes one person or thing, or one group of persons or things, from others; specifically the sum of the inherited and acquired ethical traits which give to a person his moral individuality." It is quite evident that this is not the character that is the object of proof in courts of law. This phase of the meaning of this word is purely subjective and suited more to the labyrinthine discussion of metaphysicians than practical jurists. The other definition given by the Century Dictionary, the one numbered 6, is the proper definition of the word "character" as used in the law. The word is here described as signifying "the moral qualities assigned to a person by repute; the estimate attached to an individual by the community in which he lives." In other words, the term character as thus defined is practically synonymous with the idea conveyed by the word "reputation"—it means the good or bad reputation of a person among his associates. Lord Erskine recognized this phase of the meaning of the word as the only proper one for courts and lawyers, and his definition of the word cannot be excelled, at least, for all purposes for which the law may have use for it. He defined character as "the slow-spreading influence of opinion arising from the deportment of a man in society." This definition is purely objective and clearly susceptible to direct proof, and for that reason is the one accepted in all courts.

General Rules as to Evidence of Character.—In establishing the right of self-defense in behalf of the defendant in an indictment of murder, the character of the deceased as to being turbulent, disorderly and a desperate man when in passion is often a vital factor. The general rule may be stated as follows: Where a homicide occurs under such circumstances that it is doubtful whether the act was committed maliciously or from a well-grounded apprehension of danger, testimony showing that deceased was turbulent, violent and desperate is proper in order to determine whether accused had reasonable cause to apprehend great personal injury to himself. Garner v. State, 28 Fla. 113, 9 So. Rep. 835, 29 Am. St. Rep. 232; Williams v. State, 74 Ala. 18; State v. Keene, 50 Mo. 357; Marts v. State, 26 Ohio St. 162; Basye v. State, 45 Neb. 261, 63 N. W. Rep. 811; Moore v. State, 15 Tex. App. 1; State v. Downs, 91 Mo. 19; Perry v. State, 94 Ala. 25, 10 So. Rep. 650; State v. Keefe, 54 Kans. 197, 38 Pac. Rep. 3021. Other authorities support the right of the defendant to offer in evidence facts which, in addition to showing the general character of the deceased, show also his particular animosity toward the defendant, as for instance, that he had once before assailed him, or threatened to kill him, or that there was a long-standing enmity between him and the defendant. State v. Scott, 24 Kans. 68; Rippy v. State, 39 Tenn. (2 Head.) 217; Brownell v. People, 38 Mich. 732.

Knowledge by Defendant of Deceased's Bad Character.—The fact that deceased was a turbulent or desperate man could not possibly have increased the feeling of apprehension in the mind of the defendant if he was totally ignorant of the deceased's characte

in this respect, and the general rule is well sustained that all such evidence must be excluded, until it is first shown that the accused was aware of his character as a dangerous and quarrelsome man. State v. Nash, 45 La. Ann. 1137, 13 So. Rep. 732; Redus v. People, 10 Colo. 208, 14 Pac. Rep. 328; State v. Rollins, 113 N. Car. 722, 18 S. E. Rep. 394. But where evidence has been introduced which tends to prove that defendant had knowledge of deceased's bad character, the proper foundation has been laid to warrant the admission of evidence as to deceased's reputation amoung his neighbors and associates. Smith v. United States, 161 U. S. 85, 16 Sup. Ct. Rep. 483, 40 L. Ed. 626; State v. Robertson, 30 La. Ann. 340; State v. Turpin, 77 N. Car. 473, 24 Am. Rep. 455; Marts v. State, 26 Ohio St. 162; Hudson v. State, 6 Tex. App. 565, 32 Am. Rep. 593; State v. Nett, 50 Wis. 524, 7 N. W. Rep. 344. In People v. Powell, 87 Cal. 348, 20 Pac. Rep. 481, 11 L. R. A. 75, it was held that where self-defense is relied on in justification of a homicide, evidence that defendant had been warned that deceased was a "dangerous" character, of whom it was best to beware, is admissible to show that defendant acted in the honest belief that he was in imminent danger of death or great bodily injury. The court said in the opinion, however, that, if the defendant had been simply warned to "look out" for the deceased, evidence of such warning could not be shown to prove knowledge on the part of defendant of deceased's bad character. But it has also been held that mere evidence that a fellow-citizen of the parties informed the accused that the deceased was much incensed toward him (the accused), and was a powerful and quick-tempered man, and that he advised him (the accused) to be prepared to defend himself, was inadmissible to support the theory of self-defense. State v. Cross, 68 Iowa, 180, 26 N. W. Rep. 62.

Necessity of Proving, Aliunde, Right of Self-Defense.—Of course, no evidence of the reputation of the deceased as a violent, quarrelsome, and dangerous man would be admissible where the defendant himself was the aggressor, and the killing takes place under circumstances that can afford him no reasonable ground to believe himself in danger of serious bodily harm. Bond v. State, 21 Fla. 738; State v. Watson, 36 La. Ann. 148; Steele v. Same, 33 Fla. 348, 14 So. Rep. 841; State v. Paterns, 43 La. Ann. 514, 9 So. Rep. 442; McKeone v. People, 6 Colo. 346; Jones v. People, 6 Colo. 452, 45 Am. Rep. 526; People v. Garbutt, 17 Mich. 9, 97 Am. Dec. 162; Walker v. State, 28 Tex. App. 503, 13 S. W. Rep. 860; Evers v. State, 31 Tex. Cr. Rep. 318, 20 S. W. Rep. 744. Evidence of deceased's bad character, therefore, can only be admitted under a plea of self-defense, and even then, it cannot be admitted in the absence of proof of any assault or hostile demonstration of some kind on the part of the deceased. Lang v. State, 84 Ala. 1, 4 So. Rep. 193, 5 Am. St. Rep. 324; Davidson v. People, 4 Colo. 145; Roten v. State, 31 Fla. 514; Doyal v. State, 70 Ga. 134; Cannon v. People, 141 Ill. 270, 30 N. E. Rep. 1027; State v. Stewart, 47 La. Ann. 410; People v. Hess., 40 N. Y. Supp. 486; West v. State, 18 Tex. App. 640; Smith v. United States, 1 Wash. 262; State v. Harris, 59 Mo. 550. The general rule may, therefore, be stated as follows: Proof of bad character of the deceased is admissible only when it tends in some way, in connection with the immediate circumstances under which the killing was done, to show that the prisoner had sufficient grounds, as a reasonable man, to fear that he was himself to receive at the hands of deceased some great bodily harm, and that he acted under the influence of fear in killing deceased. People v. Edwards, 41 Cal. 640.

Sufficiency of Proof of Self-Defense.—In a case of doubt whether a homicide was perpetrated in malice or from a principle of self preservation, it is right to admit evidence of the deceased's bad character, as it tends to illustrate to the jury the motive by which the defendant was influenced. The rule therefore is, stated negatively, that on a trial for murder the character of the deceased is not in issue unless the evidence previously introduced, raise a doubt whether the accused might not have acted in self-defense. Monroe v. State, 5 Ga. 85; Territory v. Harper, 1 Ariz. 399, 25 Pac. Rep. 528; People v. Stock, 1 Idaho, 218; State v. Pearce, 15 Nev. 188. Stating the rule affirmatively, if, on an indictment for murder, there is the slightest evidence, tending to show that the killing was in self-defense, or tending to show an overt act on the part of the deceased, from which, assuming that he was a violent and dangerous man, any inference can reasonably be drawn that he intended to kill defendant or inflict great bodily harm, it is error to exclude evidence of the dangerous character of deceased. Garner v. State, 28 Fla. 113, 9 So. Rep. 835, 29 Am. St. Rep. 232; State v. Benham, 23 Iowa, 154, 92 Am. Dec. 416; State v. Vaughan, 22 Nev. 285, 39 Pac. Rep. 733; State v. Matthews, 78 N. Car., 523; Abernathy v. Commonwealth, 101 Pa. St. 322; Dorsey v. State, 34 Tex. 651; State v. Turner, 29 S. Car., 34, 6 S. E. Rep. 891, 13 Am. St. Rep. 706. Authorities which hold that the facts proven in their respective cases did not furnish a sufficient foundation for the admission of evidence of character are as follows: King v. State, 90 Ala. 612; Steele v. State, 33 Fla. 348; Wise v. State, 2 Kans. 419; State v. Vance, 32 La. Ann. Rep. 1177; State v. Riddle, 20 Kans. 711; State v. Janvier, 37 La. Ann. 644.

Habit of Carrying Weapons.—It is the general rule that on the issue of self-defense, defendant may prove that deceased carried deadly weapons at the time or was in the habit of so carrying them. State v. Graham, 61 Iowa, 608, 16 N. W. Rep. 743; Wiley v. State, 99 Ala. 146, 13 So. Rep. 424; Riley v. Commonwealth, 94 Ky. 266, 22 S. W. Rep. 222; King v. State, 65 Miss. 576, 5 So. Rep. 97, 7 Am. St. Rep. 681; Branch v. State, 15 Tex. App. 96. Thus, where, after evidence that deceased had used threatening language towards defendant, of which defendant was aware, and that deceased had sought the defendant in anger, the state proved that deceased had no pistol on his person when shot by the defendant, evidence of a well-known habit of deceased of carrying a pistol, and of his reputation as a man of violent and bad temper, was held to be admissible in defendant's behalf. Riley v. Commonwealth, 94 Ky. 266, 22 S. W. Rep. 222.

Admissibility of Evidence of Deceased's Good Character in Behalf of the Prosecution.—Where the plea to in an indictment for murder is self-defense, the character of the deceased becomes material and may be shown by the state to be good, for the purpose of showing that the defendant could not have reasonably believed himself in danger. Dukes v. State, 11 Ind. 557, 71 Am. Dec. 370; Fields v. State, 134 Ind. 46, 32 N. E. Rep. 780. Thus, in rebuttal of evidence of threats by the person assaulted, and assaults by him on third persons, the state may show his general reputation for peace. Bowlus v. State, 130 Ind. 227, 28 N. E. Rep. 1115. However, it has been held that evidence to sustain deceased's character cannot be heard unless it was attacked, and then only as to those respects in which it has been attacked.

People v. Anderson, 39 Cal. 704; People v. Powell, 87 Cal. 348, 25 Pac. Rep. 481, 11 L. R. A. 75. Thus, in the last case cited it was held that evidence that it was not the habit of the deceased to go armed was not admissible on a trial for homicide because of proof having been admitted that defendant believed him to have been armed at the time he shot him, where there was no evidence of the bad character of the deceased to be rebutted, but merely testimony, and that deceased had had quarrels with several persons named. So also it has been held that where defendant defends on the ground of self-defense, and it appears that at the time of the killing, deceased, who had had a previous difficulty with defendant, was standing in the doorway of defendant's store, with his hands in the waistband of his pants, and leaning towards defendant, it was error to admit evidence that deceased was accustomed to stand in such position, in the absence of evidence to show that defendant had knowledge of such habit of deceased. Phipps v. State, 34 Tex. Cr. Rep. 560, 31 S. W. Rep. 397.

JETSAM AND FLOTSAM.

WHERE ELOQUENCE IS LOST.

A certain excellent but loud-voiced lawyer was addressing a jury. Finally, in a perfect hurricane of sound he closed his argument and sat down. The jury were impressed, and the other side was in danger.

The lawyer opposite had a sad, watery eye and a hatchet-like face. He sat patiently through the tumultuous gusts of his friend, and after the reverberations of the closing crash he rose quietly from his seat.

"As I listened to the thunderous appeals of my learned friend," he said, addressing the jury in a drawling tone.

"I recalled an old fable. You will remember, gentlemen, how the lion and the ass agreed to slay the beasts of the field and divide the spoil. The ass was to go into the thicket and bray and frighten the animals out, while the lion was to lie in wait and kill the fugitives as fast as they appeared. The ass sought the darkest part of the jungle and, lifting up his awful voice, brayed, and brayed, and brayed. The ass was quite intoxicated with his uproar, and thought he'd return and see what the lion thought of it. With a light heart he went back and found the lion looking doubtfully about him.

"'What do you think of that?' said the exultant ass. 'Do you think I scared 'em?'

"'Scared 'em?' repeated the lion, in an agitated tone. 'Why, you'd 'a scared me if I didn't know you were a jackass.'"

The jury laughed, the effect of the lawyer's sonorous eloquence was visibly weakened and he lost the case.—*Waterford (N. Y.) Times.*

A JUDICIAL PATRIARCH.

Away up in the Rocky Mountains, at an altitude of 7,000 or 8,000 feet above sea level, Hon. Henry Clay Caldwell, the senior judge of the United States Circuit Court of Appeals for the Eighth Federal Circuit, spends his summers among his children and grandchildren upon what the natives call a "ranche." In that seclusion, ten or twelve miles from the nearest postoffice or grocery store, he presents to the curious the spectacle of a veritable judicial patriarch. At a stated hour each day, the wild birds gather under his window, and, upon the same plank, enjoy a free lunch with his chickens. The antelopes, pursued by hunters, take refuge upon his grounds; he warns or drives off the pursuers and threatens them with prosecution under the game laws. The little timid animals have learned that on his grounds they have a haven of refuge, and they seek those grounds for safety as a matter of acquired habit. Thus the great Judge makes a daily example of his doctrine of a universal brotherhood, a brotherhood that embraces not only man, but the dumb animals as well. Abraham sat in his tent at the cool of the day, and angels visited him. Judge Caldwell sat in his door at the cool of the day and breathed the wonderfully bracing mountain air;

> "And the air,
> Nowhere so clear, sharpened his visual ray
> To objects distant far,"

and great marches of mountain and valley spread out before him. Angels did not visit him or feast with him in the gross sense depicted by old John Milton, who, affecting to despise the angel of theology, wrote thus of the visit of one of them to Adam:—

> "So down they sat,
> And to their viands fell; nor seemingly
> The Angel, nor in mist, the common gloss
> Of Theologians; but with keen dispatch
> Of real hunger."

But angels may have visited him in the sense in which God visited the poor cobbler in Count Tolstoi's touching little booklet entitled "Where Love Is, There God Is Also."—*American Law Review.*

SELF-EFFACEMENT IN ADVOCACY.

In an address delivered before the Kansas City Bar Association on November 8, 1902, N. H. Loomis, Esq., related the following anecdote:

"A countryman who had been serving day after day on a jury which Mr. Scarlett had addressed, was asked what he thought of the leading counsel: 'Well,' was the reply, 'that lawyer Brougham was a wonderful man; he can talk, he can; but I don't think now't of Lawyer Scarlett.' 'Indeed!' exclaimed the querist. 'You surprise me! Why you have been giving him all the verdicts.' 'Oh, there is nothing in that,' said the juror; 'he is so lucky, you see; he be always on the right side.'"

Mr. Loomis makes this reflection:

"However thoroughly we may understand and appreciate this fundamental truth, we must frankly admit that too often our vanity obtains control of us, and we become more solicitous of our own reputations as wits and orators, than we do of our clients' interests, and frequently are unable to resist the temptation of making sarcastic or humorous remarks when the opportunity presents itself, even though the result of it may be to alienate a friendly juror or prejudice the court."

Such admonition from a leading member of the bar of a sister state is timely and should be seriously considered. Probably the temptation to indulge in merely rhetorical display was greater in former times than it is to-day. One incidentally good result of the so-called commercialization of the bar has been to diminish oratorial ambition. According to the present standards, tangible results count and the methods employed in obtaining them are apt to be overlooked.

Nevertheless, an advocate may nowadays lose his case through undue egotism. Certainly he should not display resentful passion against the opposite party, or his witnesses, or counsel. Some years ago an important litigation was conducted in this city, in which

the ungovernable anger of one leader of the bar against his opponent amounted to a considerable factor in the result reached by the jury.

Again, a counsel should not intrude his personal opinions upon either the court or a jury. In his work on Professional Ethics, Judge Sharswood remarks: "Indeed, the occasions are very rare in which he (the advocate) ought to throw the weight of his own private opinion into the scales in favor of the suit he has espoused. If that opinion has been formed on the statement of facts not in evidence, it ought not to be heard—it would be illegal and improper in the tribunal to allow any force whatever to it; if on the evidence only, it is enough to show from that the legal and moral grounds on which such opinion rests.

Sometimes the character and career of a party, or a witness, constitute a legitimate subject for comment by an advocate. If the question of credibility be involved, strictures upon character are obviously proper. There is, however,a temptation on the part of men who have the habit and the reputation of being witty, to indulge in personalities for their own sake. Such temptation leads to importing into legal trials a great deal of the characteristic method of "yellow journalism." In Laidlaw v. Sage (158 N. Y., 73 103), the court of appeals expressly disapproved of sensational cross-examination.

Another offensive, very caddish form of personality, consists in warning the court or jury against the eloquence of the learned counsel on the other side. Sometimes this vein is pursued to the extent of intimating that the only possible strength of the opposite party lies in the elocutionary gifts of his counsel. The trick is Judas-like morally and, on the score of professional manners, very low-down.—*New York Law Journal.*

KLEPTOMANIA—THE "RIGHT AND WRONG" TEST.

It is a source of regret that the courts of Texas, after apparently discarding the so-called "right and wrong" test of insanity, should have deliberately taken it up again. In Lowe v. State October, 1992, 70 S. W. Rep. 206. on appeal from a conviction of theft, the defendant contended it was error not to have given a definition of "kleptomania," but it appeared the court had instructed the jury to apply the "right and wrong" test to the particular facts. It was held that there was no error, since, if kleptomania is a disease depriving one of the sense of right and wrong as to theft, the charge was sufficient, and if it is merely an irresistible impulse to steal it is no defense. The court said in part:

"The only question presented for our consideration is the action of the court failing and refusing to give a charge on kleptomania; that is, a charge specially defining this species of insanity. It is conceded that the court gave a sufficient charge on insanity generally, but that kleptomania is a monomania or particular kind of insanity, which should have been specially defined to the jury. In this connection we understand appellant to agree that the right and wrong test is applicable to kleptomania; that is, the disease of insanity must be such as to have deprived appellant at the time of the capacity to distinguish between the right and wrong of the particular act charged, which was theft. If this be conceded, then it would seem to our comprehension that the charge of the court is sufficient, because it lays down the 'right and wrong' test as to the particular act charged, and distinctly told the jury, if at the time appellant was so diseased as not to know it was wrong to commit theft, to acquit him. However, we do not understand the definition of 'kleptomania' to be as conceded by appellant's counsel. The authorities define 'kleptomania' as a species of mania, consisting of an irresistible impulse to steal. (See 1 Cleavenger, Insan., p. 177; 1 Bish. Cr. Law, § 388, subd. 3). Some of the books, however, regard it as a morbid propensity to steal, whether consciously or unconsciously. If kleptomania is simply an irresistible impulse to steal, regardless of the right or wrong test, then notwithstanding it was formerly recognized as a defense to theft by the courts of this state (see Looney v. State, 10 Tex. App. 520, 38 Am. Rep. 646; Harris v. State, 18 Tex. App. 287), that doctrine has more recently been repudiated (Hurst v. State, 40 Tex. Cr. R. 378, 46 S. W. Rep. 635, 50 S. W. Rep. 719; Cannon v. State, 41 Tex. Cr. R. 467, 56 S. W. Rep. 351). The writer dissented from the views of the majority of the court in those cases, but such is now the law of this state. So we hold, if the right and wrong test is applicable to kleptomania, the court gave a sufficient charge on the the subject. If kleptomania is merely an irresistible impulse to steal, as the authorities seem to indicate, then it is not the law in this state, and the court was not required to give a special charge on that subject."

Much more scientific and just was the position taken by the Supreme Court of Iowa in State v. McCullough October, 1901, 87 N. W. Rep. 503. The defendant had been found guilty of the crime of larceny, and upon appeal the judgment was reversed on the ground that his defense of kleptomaniac insanity had not been adequately and fairly presented to the jury. The facts shown with regard to the defendant made out a strong presumptive case of that particular form of insanity. We may repeat what we said on a former occasion in discussing the Iowa case.

"The ruling of the Supreme Court (of Iowa) upon this point is significant and valuable because, as will seen, it involves the material modification, if not the actual overruling, of one of its previous decisions. It also clearly recognizes two principles which are essential for the administration of justice to the insane. The first is that there are forms of insanity that effect the will, as distinguished from the purely intellectual or reasoning faculties, and that make the victim a helpless creature of his own insane impulse. The so-called 'knowledge of right and wrong' test of insanity has been condemned with practical unanimity by the opinion of expert alienists. Second, in the determination of moral responsibility of alleged insane persons, courts and and juries must rely upon expert opinion. The question is one of the most occult, as well as one of the most crucially important, that is ever presented to a human tribunal. We have always opposed the proposition for official experts who shall be empowered to pronounce the only and the final word. Nevertheless, in cases upon the border line of insanity, the judgment of a jury can have no legitimate basis save the opinions of experts, or a comparison of the opinions of experts if they disagree.—*New York Law Journal.*

EXPERT TESTIMONY AS TO AUTHORSHIP OF MARKS IN WRITING.

The much-discussed question of the proper scope of expert testimony especially as regards handwriting, has just arisen in a rather novel way in the case of Matter of Hopkins (1902), 172 N. Y. 360, with the result that the court of appeals has significantly set a limit to the admission of such evidence. The issue in the case was whether a will had been revoked by cancellation. A handwriting expert had been allowed to testify that certain perpendicular marks drawn with

pen and ink over the testator's signature were not made by the writer of the signature; and on appeal this opinion was held inadmissible.

The limits of the use of opinion evidence are defined in two directions. The facts of the case must be such that the jury unaided cannot form a satisfactory conclusion from them; but they must also be such that persons who are specially qualified can throw light on them and indicate their bearing on the point in issue. Here the question to be determined is whether the evidential value of the facts is not so slight and obscure that it would be useless to seek assistance from any witnesses. The characteristics of a person's handwriting are sufficiently definite and peculiar to be proper subjects of opinion evidence, but can the same be said of a mere mark? In view of the vague nature of the test suggested and the latitude of judicial discretion, it is not surprising that the decisions of the courts fall into three more or less conflicting classes. First, it is sometimes said that evidence of the identity of the maker of a mark is quite as admissible as evidence of authorship of handwriting, though it may have less weight. Lawson on Expert and Opinion Evidence, p. 350: State v. Tice (1897) 30 Oreg. 457. See also Littell v. Rogers (1896) 99 Ga. 95. Secondly, there are cases that reject such evidence absolutely. Gilliam v. Parkinson (1826) 4 Rand. (Va.) 325; Shinkle v. Crock (1851) 17 Pa. St. 159. Thirdly, the suggestion has been made that the evidence is admissible or not according as the mark has or has not something about it rendering it reasonably capable of identification as the mark of some particular person. George v. Surrey (1830); 1 Moody & Malkin 516; Carrier v. Hampton (1850) 11 Ired. Law. 307.

The cases above cited differ from that now in question in two important respects, as is pointed out by the court. In all, the mark which was the subject of the dispute was a mark in the special sense of the word; that is, an arbitrary combination of lines, supplying the place and having the effect of an ordinary signature. Such a mark, if a man were in the habit of making it, might well acquire peculiar traits, which would make it recognizable by those who were acquainted with similar specimens by the same hand. But that a number of lines drawn on one occasion only and for the purpose of cancellation should have an ascertainable resemblance to a signature in writing is a proposition that goes far beyond anything established by any series of decisions. The court in this case, therefore, was not obliged to commit itself as to the admissibility of evidence regarding signatures by mark, though it did intimate a preference for a fairly strict rule. It said very properly that the connection between the things here sought to be compared was so remote as to furnish no ground for the expression of an opinion by a witness.

The present case is also unique in that the testimony sought to be introduced was that of an expert. The value and the abuses of this kind of evidence have been the subject of much controversy (see 1 Columbia Law Review 180), but experts in handwriting, at least, should stand in no better position than the non-professional witness. Their skill may be equivalent to his personal acquaintance with the particular handwriting, but it does not license them to testify as to that which is *prima facie* impossible. In other words, the principle on which the court here proceeds is that expert evidence requires just as much logical basis as does that of any other witness.

An attempt was made to justify the admission of the evidence by reference to the New York statutes on comparison of handwriting, Laws 1880, ch. 36, and Laws 1888, ch. 555, which provide for "comparison of a disputed writing" with certain kinds of writing specified. This was the view of the lower court, Matter of Hopkins (1902) 73 App. Div. 559, but it rests on a misinterpretation of the statutes. The effect of these was exhaustively considered in People v. Molineux (1901) 168 N. Y. 264 (commented on in 2 Columbia Law Review 39); and it was declared to amount only to a modification of the technical common-law rules relating to comparison of handwriting. Apart from the doubt whether the term "writing" could include any inscription whatever, it is not to be supposed that the legislature meant to vary the logical principle as to what is evidence when it changed the legal rules respecting its admissibility.—*Columbia Law Review.*

BOOK REVIEWS.

MORSE ON BANKS AND BANKING.

The tendency seems to be growing stronger to perpetuate the names of great law text-book writers by carefully revising their works at regular periods rather than looking for new writers to enter the field and attempt to cover the field by original research. Wherever an author has done his work well and laid deep the foundations of the law in any particular field, the tendency of the profession is to regard the revision of such a work of greater value than the preparation of an entirely new treatise. Of such author, are Story, Cooley, Dillon, Washburn Daniel, Bishop, Woerner, Pomeroy and Morse. The book we have before us for review at this time is by the author last mentioned, the celebrated treatise on the Law of Banks and Banking. From its first appearance, Mr. Morse's Law of Banks and Banking has steadily increased in favor. There is no book on the subject quoted so frequently, or with so great a measure of approval, by bench and bar. Nearly every court of last resort in the country, from the Supreme Court of the United States down, has referred to it as the highest authority in its department.

It is generally recognized by the bar of the country, and constantly cited by the courts as the leading authority on the law of banks and banking. The revising editor, Mr. Frank Parsons, in speaking of the new cases added, says: "Many cases specifically approve and reaffirm the rules and principles cited from the text, and in only one case that has come under our observation did the court reject the rule stated in the text." This is a remarkable showing; but that is the test of a good law-book. Men like Cooley, Bishop, Daniel, and Morse have been able to lead the courts, and to establish principles. In this, they differ from the great multitude of annotators who pass off for text-writers, but who merely chronicle the decisions, but have no voice or opinion of their own. Mr. Morse's work will long remain the highest and most accessible authority on all questions relating to the subject of banks and banking. Published in one volume of 743 pages, by Little, Brown & Co., Boston, Mass.

STEARNS ON SURETYSHIP.

One of the most refreshing and delightful law-books which we have had occasion to review for some time is a recent work on the Law of Suretyship by Arthur Adelbert Stearns of the Cleveland bar. In many respects this treatise is the most accurate and authoritative work on this subject that has as yet come to our

notice. For instance, the book is absolutely free from the common vice of modern law-books,—the digest style of writing. The importance of the statement thus made is considerably underrated by the average lawyers. Many an attorney in purchasing a legal text-book will emphasize the inquiry whether the author has exhausted the authorities, failing, at the same time, to pursue the investigation a litttle further and inquire whether it would *exhaust* the seeker after knowledge in attempting to find what he wants. The mere jumble of authorities, however exhaustive, is far less available to the lawyer than a treatise properly and logically classified. The merest tyro can prepare a text-book on any subject by consulting the digests and putting together the abbreviated statements of the law there found, not with brains, but by a process involving little else but paste and scissors. We tremble for the success of a lawyer who must depend upon such work. More than this, however, a legal text-book, besides being absolutely exhaustive of the authorities and based upon a proper and logical classification, must show an intelligent grasp of the fundamental principles from which, as a starting point, every authority has reached its respective conclusion. It should state also the process of reasoning by which the results and conclusions of the authorities have been reached, and if premises or reasoning in any case, are unsound, the author should be acute and fearless enough to clearly put his finger on the error and, if necessary, point out the way to the proper solution of the particular question involved.

In all the foregoing respects by which a good legal text-book is to be judged, Stearns on Suretyship excels all others on the particular subject-matter of which it treats. We do not say it is perfect,—Cooley or Bishop may have written a better one—nor would we discourage any other author from trying to reach still greater perfection, but his task will indeed be a most difficult one. The division of this work into chapters will give an idea of the ground attempted to be covered by the author. Chapter 1, The Contract; Chapter 2, The Statute of Frauds; Chapter 3, Commercial Guaranties; Chapter 4, Suretyship Defenses; Chapter 5, Suretyship as Related to Negotiable Instruments; Chapter 6, Bonds to Secure Private Obligations; Chapter 7, Official Bonds; Chapter 8, Judicial Bonds; Chapter 9, Corporate Suretyship; Chapter 10, The Rights and Remedies of the Promisor After Payment. Printed in one volume of over 800 pages and published by W. H. Anderson Co., Cincinnati, Ohio.

BOOKS RECEIVED.

Complete Index-Digest of the Leading Articles, Legal Essays, Editorials, Cases in Full, Annotations, Notes of Recent Decisions, Book Reviews and Legal Miscellany, in Volumes 1 to 54, inclusive, of the Central Law Journal, being from January, 1874, to July, 1902, to which is added a list of the Legal Essays and Annotations, together with the names of the authors and contributors thereof. Also a Complete Table of Cases cited in the 54 volumes. By Alexander H. Robbins, Editor, St. Louis, Mo.: Central Law Journal Company, Law Publishers, 1902. Cloth, pp. 573. Price, $6.50. Review will follow.

A Treatise on the Law of Negotiable Instruments, including Bills of Exchange, Promissory Notes, Negotiable Bonds and Coupons, Checks, Bank Notes, Certificates of Deposit, Certificates of Stock, Bills of Credit, Bills of Lading, Guaranties, Letters of Credit, and Circular Notes. By John W. Daniel, of the Lynchburg, Virginia Bar. In two volumes. Fifth Edition. Re-edited and Enlarged with Notes and References to American and English Cases, by John W. Daniel, the Author, and Charles A. Douglass, of the Bar of the District of Columbia, and Professor of the Law of Negotiable Instruments in Georgetown Univeristy of Washington, D. C. New York: Baker, Voorhis & Company, 1903. Sheep, pp. 2100. Price, $12. 60. Review will follow.

The Elements of the Law of Negotiable Instruments, by John W. Daniel, of the Lynchburgh, Va., Bar and Author of "Daniel on Negotiable Instruments," and Chas. A. Douglass, of the Bar of the District of Columbia, and Professor of the Law of Negotiable Instruments in Georgetown University, of Washington, D. C. New York: Baker, Voorhis & Company, 1903. Canvas, pp. 449. Price, $3.25. Review will follow.

HUMOR OF THE LAW.

The man stammered painfully. His name was Sissons. Especially difficult to him was the pronunciation of his own name. He had the misfortune to stay out late and uproariously one night, and to account for it before the magistrate at the police court next morning. "What is your name?" asked the court. Sissons began his reply: "Sss—ss—sss—ss—siss—" "Stop that noise and tell me what is your name," said the judge, impatiently. "Siss—sss—sss—sissss——" "That will do," said his honor, severely; "officer, what is this man charged with?" "I think, your Honor, he's charged wid sody-water."

A lawyer who has won some distinction through his success in compromising suits for damages by accident, says his most interesting client was a Swedish farmer from Delaware county, whose wife had been killed in Philadelphia by a train crossing the streets at a grade.

The widower was simply inconsolable, and, having been told that he could get $10,000 if he insisted on pushing the case, refused for months to talk compromise. The lawyer, of course, did all possible to keep the hearing back, in the hope of discouraging, the Swede, and at last he was rewarded by an offer to settle at a reasonable figure.

The Swede called, the lawyer said $500, and the bereaved one quickly accepted. As he folded the check and pocketed it, he observed:

"Vell, I deed not do so padlee! I'fe got fif' hoondred tollar and a goot teal better vife than I had beefere. She and me vas married yesterday."

A lawyer whose eloquence was of the spread eagle sort was addressing the jury at great length, and his legal opponent, growing weary, went outside to rest.

"Mr. B. is making a great speech," said a friend to the bored counsel.

"Oh, yes; Mr. B. always makes a great speech. If you or I had occasion to announce that two and two make four, we'd be just fools enough to blurt it right out. Not so Mr. B. He would say:

"If, by that arithmetical rule known as addition, we desired to arrive at the sum of two integers added to two integers, we should find—and I assert this boldly, sir, and without the fear of successful contradiction—we, I repeat, should find by the particular arithmet-

ical formula before mentioned — and, sir, I hold myself perfectly responsible for the assertion I am about to make — that the sum of the two given integers added to the two other integers would be four!"

Judge: The witness told all that happened on the second floor; now, why do you object to his telling what happened on the third floor.

Counsel: Because, if it pleases your honor, that is another story.

He looked happy enough as he walked up to the postoffice box, set a huge bundle on the floor and began taking pretty square envelopes therefrom, dropping them by twos and threes into the box.

"Big lot of letters," remarked the policeman. "Nice day, too."

"Letters!" said the happy man. "My dear fellow, these are not letters. They are wedding invitations."

A stern look came over the face of the hitherto friendly policeman.

"My friend," he said, "I am sorry to disturb you, but I must do my duty. Come with me."

"Arrested?"

"Yes."

"On what charge, sir? This is an outrage."

"Not at all. You are advertising a lottery through the post."

The man went along.

One day recently the senate did not meet at noon, says a Washington paper. The hands of the clock were at least three minutes past the hour of twelve when the chaplain lifted his voice in the opening prayer. And all because Senator Frye was telling a story to the preacher.

"When I was up in Maine recently," said Mr. Frye, "I was summoned to prepare a will for a man who was very ill. It was necessary, of course, to secure two witnesses, and they had to be sent for. While we were waiting for them to arrive the man seemed to get worse, and I thought it my duty, no minister being present, to talk seriously to him. I told him that he was very ill and that it was likely he would soon depart this life.

"'And are you ready to meet this great change?' I asked him.

"'I will be,' was the reply, 'as soon as those d—d witnesses get here.'"

The municipal departments were under investigation by a senate committee sitting in one of the rooms of the supreme court, and the old city inspector's department was under fire to test the qualifications of that official's appointees for "health wardens," some score or more in number, who, at high salaries, were employed, as their title indicated, to watch over the health of the city. One of these worthies went on the stand and described his experience with the families in his district and his discovery that the members of one family were "hygienics." "And what," asked Judge Whiting, "are those?" "Why," rejoined the witness, "people who doctor themselves." This reply was received with great amusement by all present, and particularly by the health warden, who was next to take the stand. When his name was called he advanced with a confident air and gave his direct evidence with volubility. No sooner did Judge Whiting rise to cross-examine him than he broke in with the statement that counsel need not try to puzzle him, for he knew what hygiene was. "Then," said the judge with unwonted suavity, "please tell us all about it." "Hygiene," said the witness, "is the effluvia arising from stagnant water." "The fumes of which," queried the judge gravely, "are prejudicial to human life." "Exactly so," responded the witness, and he was excused from further tests of his qualifications.

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

1. ABATEMENT AND REVIVAL — Joint Contract. — Where one of two joint parties upon the same side of a contract dies, the survivor may prosecute an action in his own name. — Northness v. Hillestad, Minn., 91 N. W. Rep. 1112.

2. ABDUCTION — Chastity of Female. — On a prosecution for abduction, under Shannon's Code, § 6462, the accused may discharge the burden on him of showing the unchastity of the female by introducing enough testimony to raise a reasonable doubt as to her chastity. — Griffin v. State, Tenn., 70 S. W. Rep. 66.

3. ADVERSE POSSESSION — Color of Title. — A deed, though made by one having no authority to convey, is sufficient color of title to support a claim of adverse possession. — Roth v. Munzenmaier, Iowa, 91 N. W. Rep. 1072.

4. ALIENS — Japanese Naturalization. — A native of Japan held not eligible to naturalization under Rev. St. U. S. § 2169. — *In re* Takuji Yamashita, Wash., 70 Pac. Rep. 482.

5. ANIMALS — Killing Sheep. — Under Burns' Rev. St. 1901, § 2857, one engaged in buying and selling sheep, as well as one raising them, may recover of the township for killing of sheep by dogs. — Wayne Tp., Marion County, v. Jeffery, Ind., 64 N. E. Rep. 933.

6. APPEAL AND ERROR — Affirmance on Certificate. — An appellant cannot abandon his appeal and defeat appellee's right to an affirmance on certificate. — Erwin v. Erwin, Tex., 70 S. W. Rep. 102.

7. APPEAL AND ERROR — Bill of Exceptions. — Character of a bill of exceptions held not changed by its designation in the clerk's certificate as a transcript of the evidence. — Oster v. Broe, Ind., 64 N. E. Rep. 918.

8. APPEAL AND ERROR—Conclusions of Law.—The conclusions of law of the trial court are open for review without any exceptions.—Steele v. Johnson, Mo., 69 S. W. Rep. 1065.

9. APPEAL AND ERROR — Jury in Equity Case. — The charge of the court in an equity case, in submitting questions to the jury for special findings, is not subject to review; the findings being merely advisory. — Apland v. Pott, S. Dak., 92 N. W. Rep. 19.

10. APPEAL AND ERROR — Presumption. — Where the record does not show that on motion for new trial the court heard any evidence outside of the affidavits, there is no presumption that other evidence was heard sufficient to sustain a refusal thereof. — Head v. Ayer & Lord Tie Co., Ky., 70 S. W. Rep. 55.

11. APPEAL AND ERROR — Remark of Court.—Where an erroneous remark of the court has been brought to his attention, it is not necessary that it be made ground for a new trial in order to make it reviewable on appeal.—Coldren v. Le Gore, Iowa, 91 N. W. Rep. 1066.

12. APPEAL AND ERROR — Review. — That a ruling requiring a question to show certain facts may be reviewed, it should be shown what was expected to be proved, or that the ruling was harmful. — O'Malley v. Commonwealth, Mass., 65 N. E. Rep. 30.

13. ATTORNEY AND CLIENT — Disbarment.—An application by disbarred attorney for reinstatement should be verified and set out the disbarment proceedings, with the reasons why petitioner should be reinstated. — *In re* Newton, Mont., 70 Pac. Rep. 510.

14. BAIL — Appeal. — A recognizance on appeal from a conviction of misdemeanor held defective, if it fails to state that defendant was convicted of a misdemeanor, and to state the punishment imposed, as required by Code Cr. Proc., art. 887.—Kapps v. State, Tex., 70 S. W. Rep. 83.

15. BANKRUPTCY—Avoiding Executions.—Under Bankr. Act 1898, § 67, lien of execution on property bought by bankrupt within 60 days of petition in bankruptcy held void, though the common-law rule as to lien relating back to test of executions prevails. — *In re* Darwin, U. S. C. C. of App., Sixth Circuit, 117 Fed. Rep. 407.

16. BANKRUPTCY — Claim by Married Woman. — The failure of a married woman to register a claim against her husband as her separate property under the law of Oregon does not affect her right to prove the same against his estate in bankruptcy. — *In re* Miner, U. S. D. C., D. Oreg., 117 Fed. Rep. 953.

17. BANKRUPTCY — Discharge.—Specifications of objection to the discharge of a bankrupt are pleadings, and should be verified, as required by section 18c, Bankr. Act. —*In re* Baerncopf, U. S. D. C., E. D. Pa., 117 Fed. Rep. 975.

18. BANKRUPTCY — Petition. — Where the schedule attached to a petition in bankruptcy named certain parties as creditors, the statute of limitations against such creditors' claims was thereby waived.—*In re* Gibson, Ind. Ter., 69 S. W. Rep. 974.

19. BANKRUPTCY—Preference. — Under Bankr. Act 1898, ch. 1, § 1, subd. 15, and chapter 6, § 60b, a payment is preferential only when the person to whom it is made has reasonable cause to believe that insolvency existed at the time it was made. — Harmon v. Walker, Mich., 91 N. W. Rep. 1025.

20. BANKRUPTCY — Subsequent Rent. — Landlord held not entitled to prove a claim for rent accruing after adjudication in bankruptcy against the bankrupt tenant's estate.—*In re* Hays, Foster & Ward Co., U. S. D. C., W. D. Ky., 117 Fed. Rep. 879.

21. BANKS AND BANKING—Certified Check.—By certifying a check, a bank is bound to pay the same when presented at any time within the statute of limitations, and is estopped to deny that it possessed sufficient funds of the drawer to pay the same. — Jackson Paper Mfg. Co. v. Commercial Nat. Bank, Ill., 65 N. E. Rep. 136.

22. BENEFIT SOCIETIES — Notice of Assessment. — A service of a notice of assessment by mail in accordance with the terms of the by-laws is sufficient and effective.—Modern Woodmen of America v. Tevis, U. S. C. C. of App., Eighth Circuit, 117 Fed. Rep. 369.

23. BENEFIT SOCIETIES — Right to Benefit.—Under the provisions of a benefit certificate, held, that the relatives of the insured were entitled to the benefit, in the absence of proof that the named beneficiary survived the insured. —Males v. Sovereign Camp Woodmen of the World, Tex., 70 S. W. Rep. 108.

24. BILLS AND NOTES—Collection of Collateral Security. —Where, in a suit on notes, the defense was that collateral had been pledged from which plaintiff had collected enough to pay the notes, the burden of proof was on defendants. — Boyd's Admr. v. Farmers' Nat. Bank, Ky., 69 S. W. Rep. 964.

25. BILLS AND NOTES—Consideration.—A note executed to an evangelical preacher to aid in dissemination of doctrines believed in by the maker was supported by sufficient consideration, the preacher having continued in the work. — Woodworth v. Veitch, Ind., 64 N. E. Rep. 932.

26. BILLS AND NOTES — Purchase After Maturity. — Where it is contracted that failure to pay one of a series of notes shall mature all, a purchaser after one has matured in effect purchases all after maturity. — Lybrand v. Fuller, Tex., 69 S. W. Rep. 1005.

27. CARRIERS—Assault by Disorderly Person.—A female passenger held entitled to recover from a carrier for an assault and indignities offered her while in the carrier's waiting room by a disorderly person permitted to be there. — Houston & T. C. R. Co. v. Phillio, Tex., 69 S. W. Rep. 994.

28. CARRIERS — Contributory Negligence.—A passenger taking a chair, instead of a seat provided for passengers, in a caboose, held not to be in the exercise of due care.— Freeman v. Pere Marquette R. Co., Mich., 91 N. W. Rep. 1021.

29. CARRIERS — Degree of Care.—A street railway company is bound to the highest degree of care in the maintenance of its tracks consistent with the nature of the undertaking. — Galligan v. Old Colony St. Ry. Co., Mass., 65 N. E. Rep. 48.

30. CARRIERS — Duty of Conductor. — Where plaintiff was standing on the steps of a street car, refusing to get off or to go back into the car, held proper to charge that it was the conductor's duty to use reasonable force to make the plaintiff get off or return into the car. — Brace v. St. Paul City Ry. Co., Minn., 91 N. W. Rep. 1099.

31. CARRIERS —Personal Injury.—In an action by a passenger for personal injuries, it was improper to condition the finding of contributory negligence on alighting from a moving train on a finding that plaintiff knew it was moving. — Galveston, H. & S. A. Ry. Co. v. Hubbard, Tex., 70 S. W. Rep. 112.

32. CARRIERS — Riding on Running Board. — In action for injuries from being struck by street car while riding on running board of another car, held proper to exclude evidence that new cars of defendant had a rail on the inside. — Moody v. Springfield St. Ry. Co., Mass., 65 N. E. Rep. 29.

33. CHAMPERTY AND MAINTENANCE — Attorney and Client. — Under the law of Michigan an agreement that attorneys shall receive a share of the recovery in payment for their services is lawful. — Fletcher v. McArthur, U. S. C. C. of App., Sixth Circuit, 117 Fed. Rep. 393.

34. CHATTEL MORTGAGES—Sufficiency of Description.— A description of property in a chattel mortgage which is good as between the parties is *prima facie* sufficient as between the mortgagee and a trespasser, who injures or converts the property after default in payment of the mortgage. — O'Brien v. Miller, U. S. C. C., D. Conn., 117 Fed. Rep. 1000.

35. COLLISION — Vessels Equally at Fault.—In a suit for collision, where both vessels are found in fault and the damages divided, interest is not recoverable, except from the date of final decree. — The Itasca, U. S., D. C., S. D. Ga., 117 Fed. Rep. 885.

36. CONSTITUTIONAL LAW — Violation of Contract.—An ordinance ordering a change in the location of street railway tracks held not void as in violation of a contract or vested rights. — Snouffer v. Cedar Rapids & M. City Ry. Co., Iowa, 92 N. W. Rep. 79.

37. CONSTITUTIONAL LAW—Water Company's Maximum Charges. — A city has no right to fix the maximum rates which may be charged by a water company so low that it will result in depriving the company of property without due process of law. — Cedar Rapids Water Co. v. City of Cedar Rapids, Iowa, 91 N. W. Rep. 1081.

38. CONTRACTS — Assignment. — In the absence of evidence that revenue stamps were omitted from an assignment of a lease with intent to defraud the government, such omission did not invalidate the assignment.—First Nat. Bank v. Stone, Iowa, 91 N. W. Rep. 1076.

39. CONTRACTS — Breach —On breach of an advertising contract, the publisher held not entitled to proceed with the insertion of matter and recover the contract price.—William E. Peck & Co. v. Kansas City Metal Roofing & Corrugating Co., Mo., 70 S. W. Rep. 169.

40. CONTRACTS—Doubtful Claim.—Faulty performance of a contract, as between other parties thereto, held to afford one whose claims thereunder had been satisfied no ground of complaint.—Adams v. Crown Coal & Tow Co., Ill., 65 N. E. Rep. 97.

41. CONTRACTS—Expression of Opinion.—False expressions of opinion as to future transactions held sufficient to authorize an avoidance of contracts induced thereby.—American Cotton Co. v. Collier, Tex., 69 S. W. Rep. 1021.

42. CONTRACTS — Street Improvement.—The fact that a contract for the improvement of a street with asphalt limited the material to Trinidad asphalt, alleged to be controlled by a trust, held not to invalidate the contract.—Field v. Barber Asphalt Pav. Co., U. S. C. C., W. D. Mo., 117 Fed. Rep. 925.

43. CONTRACTS — Water Supply.—A contract by a town with a waterworks company for a public supply of water for 30 years was not unreasonable as a matter of law and void as *ultra vires*.—Hurley Water Co. v. Town of Vaughn, Wis., 91 N. W. Rep. 971.

44. CORPORATIONS—Contract Made Before Incorporation.—A corporation cannot be a party to a contrac made before its organization.—Holyoke Envelope Co. v. United States Envelope Co., Mass., 65 N. E. Rep. 54.

45. CORPORATIONS — Laches.—Stockholders, who took no steps to repudiate the action of their proxy at a stockholders' meeting until more than a year after such action was taken, held barred by laches from the right to relief.—Synnott v. Cumberland Bldg. Loan Assn., U. S. C. C. of App., Sixth Circuit, 117 Fed. Rep. 379.

46. CORPORATIONS—Unpaid Subscriptions.—A holder of stock delivered to him by the corporation as a bonus for making it a loan, without any agreement or expectation that it should be paid for, cannot be held liable to creditors for an unpaid subscription under Const. Neb. art. 11b, § 4. Seaboard Nat. Bank v. Slater, U. S. C. C., D. Conn., 117 Fed. Rep. 1002.

47. COUNTY COMMISSIONERS—Offer of Reward.—Where county commissioners offer a reward in excess of their authority, they do not become individually liable thereby to a third person acting upon such offer.—Scheiber v. Von Arx., Minn., 92 N. W. Rep. 3.

48. COURTS — Prejudicial Error. — Communication by judge after submission of the cause to the jury, in answer to its inquiry, that they could recommend defendant to mercy and that the judge invariably respected such recommendations, held prejudicial error.—State v. Kiefer, S. Dak., 91 N. W. Rep. 1117.

49. COURTS — Transcript. — An assertion of a stenographer that a transcript of certain proceeding was not needed by the attorney general held not to relieve him of his duty of furnishing such transcript. — State v. Ledwidge, Mont., 70 Pac. Rep. 511.

50. CRIMINAL LAW — Bill of Exceptions. — Refusal to require the state to elect upon which one of several transactions it would proceed held not reviewable, where defendant's exception is not incorporated in the bill of exceptions.—State v. Rigall, Mo., 70 S. W. Rep. 150.

51. CRIMINAL LAW — Conviction of Lesser Crime.—Where appellant was convicted of a lesser crime than charged, he cannot complain of error in refusing to instruct thereon.—Morton v. State, Tex., 70 S. W. Rep. 98.

52. CRIMINAL LAW—False Pretenses.—In a trial for obtaining goods under false pretenses, evidence of similar offenses at about the same time held admissible to prove intent.—Commonwealth v. Lubinsky, Mass., 64 N. E. Rep. 966.

53. CRIMINAL LAW—Intoxication as a Defense.—Intoxication held no defense to an indictment for burglary, if the accused knew right from wrong.—State v. Ford, S. Dak., 92 N. W. Rep. 18.

54. CRIMINAL LAW — Involuntary Confession. — Independent inculpatory facts, discovered in consequence of an involuntary confession, held admissible in a prosecution for crime.—State v. Height, Iowa, 91 N. W. Rep. 935.

55. CRIMINAL LAW—Rape.—Statements in the jury room as to licentious conversations and actions by the defendant, on trial for rape, which were not properly before the jury, held to justify a new trial.—Sims v. State, Tex., 70 S. W. Rep. 90.

56. CRIMINAL TRIAL—Remarks of Counsel.—A judgment will not be reversed for objectionable remarks of prosecuting attorney, without objection made.—Hoyle v. State, Tex., 70 S. W. Rep. 94.

57. CURTESY — Construction of Statute. — Husband's right of curtesy in case he survived his wife held not devested by act 1894, declaring that marriage should give the husband no interest in his wife's property.—Dillon v. Dillon, Ky., 69 S. W. Rep. 1099.

58. DAMAGES — Injuries to Servant. — In an action for injuries to a servant, evidence of injury causing a defect of hearing, impairment of speech, etc., held within the complaint, alleging injury to the nervous system.—Missouri, K. & T. Ry. Co. of Texas v. Hawk, Tex., 69 S. W. Rep. 1037.

59. DAMAGES—Mortality Tables.—There being evidence that plaintiff's injury was permanent, there was no error in admitting mortality tables.—Galveston, H. & S. A. Ry. Co. v. Hubbard, Tex., 70 S. W. Rep. 112.

60. DAMAGES — Personal Injuries.—Where, in an action for injuries, a dislocation of the hip was charged, plaintiff held entitled to recover under such allegation for a bruise or contusion of the hip.—St. Louis S. W. Ry. Co. of Texas v. Brown, Tex., 69 S. W. Rep. 1010.

61. DEATH — Damages Not Excessive. — In an action against a street railway company for negligently causing the death of a boy six years of age, a verdict fixing the damages at $2,750 held not excessive.—Gray v. St. Paul City Ry. Co., Minn., 91 N. W. Rep. 1106.

62. DEATH — Presumption of Survivorship. — The common law does not indulge in any presumption of survivorship or death by reason of age or sex, when two are lost in a common disaster. — Males v. Sovereign Camp Woodmen of the World, Tex., 70 S. W. Rep. 108.

63. DEEDS—Construction.—The character "&" in a deed means "and." — Beedy v. Finney, Iowa, 91 N. W. Rep. 1069.

64. DEPOSITIONS — Accused's Right to Confront Witness. — The deposition of a witness, since deceased, taken on notice to an accused, but without his consent or presence, is not admissible against him on his trial.—United States v. French, U. S., D. C., D. Oreg., 117 Fed. Rep. 976.

65. DEPOSITIONS—Right to Use.—Where the deposition of a witness had been duly taken, it was not error to permit plaintiff to read it, though the witness was in court.—Louisville & N. R. Co. v. Steenberger, Ky., 69 S. W. Rep. 1094.

66. DIVORCE—Misconduct of Both Parties.—Where the evidence in an action for divorce shows that both parties were to blame for their domestic infelicity, a divorce will not be granted to either.—Anderberg v. Anderberg, Iowa, 91 N. W. Rep. 1071.

67. EASEMENT — Right of Way — A deed relocating the site of a right of way, and substituting a new site in its place, will not be held effectual to discharge the old site from the easement, but ineffectual to substitute the new site in its place.—Atlantic City v. New Auditorium Pier Co., N. J., 53 Atl. Rep. 99.

68. ELECTIONS — Australian Ballot.—The provisions of the Australian ballot law do not give a nominee of the county convention not recognized as regular by the state convention the right to appeal to the courts for relief. — State v. Lindahl, N. Dak., 91 N. W. Rep. 950.

69. ELECTIONS — Nominating Convention.—A minority of the lawful delegates to a political convention cannot withdraw, and unite themselves with persons whose credentials have been rejected, and claim that they constitute a legal party convention.— State v. Porter, N. Dak., 91 N. W. Rep. 944.

70. EMINENT DOMAIN—Condemnation Proceedings.—In proceedings to condemn property for park purposes, appraisers' award, giving a sum for "building and improvements," held not objectionable for failure to put a valuation upon the building alone.—*In re* Board of Park Comrs. of City of Minneapolis, Minn., 91 N. W. Rep. 1111.

71. EMINENT DOMAIN — Condemnation Proceedings.— In a proceeding to condemn land, an instruction that the jury could not consider any speculative uses of the land taken or that not taken held properly refused.—Seattle & M. R. Co. v. Roeder, Wash., 70 Pac. Rep. 498.

72. EMINENT DOMAIN—Damages.—On condemnation of land for railroad purposes, damages are to be awarded as of the time of entry by the railroad.—Van Husan v. Omaha Bridge & Terminal Co., Iowa, 92 N. W. Rep. 47.

73. EMINENT DOMAIN—Highways.— That there was a crop growing on land on certain date held not to warrant a perpetual injunction against an opening of a road thereafter through the land.—Seafield v. Bohne, Mo., 69 S. W. Rep. 1051.

74. ESTOPPEL — Special Assessments. — One taking a conveyance of lots subject "to all special assessments" is not estopped to question the validity of an assessment of which he did not know, and which did not enter into the determination of the price.—Gill v. Patton, Iowa, 91 N. W. Rep. 904.

75. ESTOPPEL—Wife's Separate Estate — A wife who obtains money by representing that it was for her separate estate held estopped to defend on the ground that her husband persuaded her to do so.—National Lumberman's Bank v. Miller, Mich., 91 N. W. Rep. 1024.

76. EVIDENCE—Ancient Deeds.—Proof of possession of the subject of the grant is not indispensable to render an instrument admissible as an ancient deed, where there is nothing to excite suspicion as to its genuineness.—Hodge v. Palms, U. S. C. C. of App., Sixth Circuit, 117 Fed. Rep. 396.

77. EVIDENCE—Defendant's Daybook.—The reading by defendant, as a part of his evidence, of certain entries from his daybook, held proper —Place v. Baugher, Ind., 64 N. E. Rep. 852.

78. EVIDENCE — Meaning of "Preponderance."—"Preponderance of evidence" means that the testimony on the issue in question appears more credible than that to the contrary.—McKee v. Verdin, Mo., 70 S. W. Rep. 154.

79. EXECUTORS AND ADMINISTRATORS — Distribution Before Debts Are Paid. — Distribution made to the heirs on the advice of counsel and a probate judge, before the debts are paid, is made at the peril of the administrator. —James v. West, Ohio, 65 N. E. Rep. 156.

80. EXECUTORS AND ADMINISTRATORS — Sale of Land.— To authorize a sale of the real estate of a decedent, where the debts amount to less than the value of the whole, it must be alleged in the petition that the residue would be greatly depreciated by a sale of less than the whole. — *In re* Snow, Me., 53 Atl. Rep. 116.

81. FIRE INSURANCE—Waiver by Adjuster.—An adjuster of an insurance company held to have authority to waive a provision of the policy concerning proofs of loss.—Germania Fire Ins. Co. v. Pitcher, Ind., 64 N. E. Rep. 921.

82. FRAUDS, STATUTE OF—Oral Contract. — Payment of part of the price is not such a part performance as will take an oral contract for sale of land out of the statute of frauds, Burns' Rev. St. 1901, § 6629. — Riley v. Haworth, Ind., 64 N. E. Rep. 928.

83. FRAUDULENT CONVEYANCES—Collusion.—An agreement between a debtor and his cousin and brother as to attachments to be sued out by them held a fraudulent devise for the preference of such creditors.—Chestnut v. Russell, Ky., 69 S. W. Rep. 965.

84. FRAUDULENT CONVEYANCES — Husband and Wife.— When a husband fraudulently conveyed land to his wife, she could not, as against his creditors, execute a valid mortgage thereon for a debt of the husband barred by limitations.—Liver v. Thielke, Wis., 91 N. W. Rep. 975.

85. HIGHWAYS — Obstructing Streets.—In an action for death of bicycle rider owing to his having run into stone in street, held not negligence for deceased to have ridden in the street.—Overhouser v. American Cereal Co., Iowa, 92 N. W. Rep. 74.

86. HIGHWAYS—Runaway Horses.—Proof by plaintiff of accident from defendant's team running away without a driver on a public road makes a *prima facie* case of negligence, putting the burden of explanation on defendant. —Gorsuch v. Swan, Tenn., 69 S. W. Rep. 1113.

87. HOMESTEAD — Abandonment.—Defendant in execution not being at the time of the sale entitled to homestead, the sheriff is not required to notify him in regard to homestead rights. — Smith v. Thompson, Mo., 69 S. W. Rep. 1040.

88. HOMESTEAD—Forfeiture.—A widow, who had homestead assigned from the estate of her deceased husband, forfeited it, for the time being, by becoming a resident of another state.—Coile v. Hudgins, Tenn., 70 S. W. Rep. 56.

89. HOMICIDE — Manslaughter. — In a prosecution for homicide, which was either murder in the second degree or committed in self-defense, it was not error for the court to fail to charge on manslaughter. — State v. Diller, Mo., 70 S. W. Rep. 139.

90. HOMICIDE—Plea of Self-Defense. — Self-defense, as a plea to a prosecution for murder, is not available to an accused who, by assaulting the decedent, provoked the peril he sought to defend against.— Henry v. People, Ill., 65 N. E. Rep. 120.

91. HUSBAND AND WIFE—Community Property.—Debts incurred by surviving wife, after qualifying as administrator of the community property, held not a lien on the whole estate.—Faris v. Simpson, Tex., 69 S. W. Rep. 1029.

92. INDIANS—Exempt Improvements.—Under Act Cong. May 2, 1890, § 31, held, that only those improvements on Indian lands which belong to Indians by blood are exempt from judicial sale.—Hampton v. Mays, Ind. Ter., 69 S. W. Rep. 1115.

93. INDICTMENT AND INFORMATION—Variance in Name of Accused. — Where a party is commonly known by the name alleged, that the evidence shows that he is also commonly known by another name will not defeat the prosecution.—Luna v. State, Tex., 70 S. W. Rep. 89.

94. INTOXICATING LIQUORS — C. O. D. Shipments. — Liquor shipped into the state C. O. D., and held by the express company for delivery on payment, held contraband under the liquor law. — State v. American Exp. Co., Iowa, 92 N. W. Rep. 66.

95. JUDGMENT—Default.—An order of the circuit court refusing to open a default judgment will not be disturbed to permit the judgment debtor to make a defense open to him at the time of the default. — Hoffman v. Loudon, Mo., 70 S. W. Rep. 162.

96. JUDGMENT — Fraud.—A judgment for plaintiff in an action brought and prosecuted by him cannot be treated as a nullity because of fraud practiced by defendant on the court in entering it. — Oster v. Broe, Ind., 64 N. E. Rep. 918.

97. JUDGMENT — Vacating Appearance.—Where a judgment against nonresidents showed no service of publication, and the appearance by attorneys for the defendants was stricken from the record as unauthorized, so

that the judgment appeared on the record to be void, the court was authorized to vacate it.—Stai v. Seldon, Minn., 92 N. W. Rep. 6.

98. JUDGMENT — Vendor's Lien.—Where, on appeal in a suit on vendor's lien notes given by a decedent, his heir at law was not a party to the appeal, she was not bound by the judgment.—Dodd v. Hewitt, Ky., 69 S. W. Rep. 955.

99. JURY—Preconceived Opinions.—Jurors having opinions, in a murder case held not disqualified, where they state they can try the case on the law and the evidence alone.—Wilson v. State, Tenn., 70 S. W. Rep. 57.

100. LANDLORD AND TENANT — Assignment of Lease.—The lessee cannot release agreement of the assignee in assignment of lease, after it has become one with the lessor by his accepting rent from the assignee. — Adams v. Shirk, U. S. C. C. of App., Seventh Circuit, 117 Fed. Rep. 801.

101. LANDLORD AND TENANT—Escaping Gas.—A tenant of part of premises held not to assume risk of gas escaping from landlord's pipes. — Indianapolis Abattoir Co. v. Temperly, Ind., 64 N. E. Rep. 906.

102. LANDLORD AND TENANT — Liability of Subtenant.—Where a lessee surrenders the leasehold, and a subtenant, after such surrender, attorns to the original lessor, he becomes liable for rent for the full term of his sublease.—McDonald v. May, Mo., 69 S. W. Rep. 1059.

103. LARCENY — County Warrant. — A county warrant may be the subject of larceny. — State v. Morgan, Tenn., 69 S. W. Rep. 970.

104. LICENSES—Construction of Ditch.—Plaintiff cannot enforce a parol license to construct a ditch, where, after construction and injury to part of it, he recovers damages from the licensee, including the entire cost of construction.—Oster v. Broe, Ind., 64 N. E. Rep. 918.

105. LIFE ESTATE—Repairs.—As between the owners in fee of land and one having a homestead right therein, held, that repairs may be made from proceeds of standing timber.—Flener v. Flener, Ky., 69 S. W. Rep. 954.

106. LIFE INSURANCE — Insurable Interest.—A daughter has an insurable interest in the life of her father.—Farmers' & Traders' Bank v. Johnson, Iowa, 91 N. W. Rep. 1074.

107. LIFE INSURANCE — What Law Governs. — Where a policy declared that it should be construed according to the laws of New York, but it was delivered in Missouri, where the insured resided, its laws govern in the construction of the policy. — Pietri v. Seguenot, Mo., 69 S. W. Rep. 1055.

108. LIMITATION OF ACTIONS — Replevin. — Limitations run against the right of an owner to bring replevin for property bailed, though he makes no demand when an act is done by the baillee inconsistent with the bailment. —Bollman Bros. Co. v. Peake, Mo., 69 S. W. Rep. 1058.

109. LOGS AND LOGGING—Standing Timber. Standing timber, in the hands of a purchaser under a contract indicating no time for cutting and removing the same, is realty, for the purpose of execution sale.—Dils v. Hatchet, Ky., 69 S. W. Rep. 1092.

110. MALICIOUS PROSECUTION—Successful Prosecution of Prior Action —In an action for malicious prosecution cannot be brought on a civil action in which the final judgment was for the plaintiff therein. — Swepson v. Davis, Tenn., 70 S. W. Rep. 65.

111. MANDAMUS — County Clerk. — *Mandamus* will lie to compel a county clerk to include certain officers in a notice of election, when the duty to do so is obligatory and is disregarded by the clerk.—People v. Knopf, Ill., 79 S. W. Rep. 842.

112. MANDAMUS—Court Stenographer.—Writ of mandate held to be an appropriate remedy to compel a stenographer to furnish a transcript of his notes, as required by Code Civ. Proc. § 378. — State v. Ledwidge, Mont., 70 Pac. Rep. 511.

113. MANDAMUS — Operation of Trains.—*Mandamus* will not lie in the first instance to compel railroad corporations to operate trains in a designated manner.—People v. Brooklyn Heights R. Co., N. Y., 64 N. E. Rep. 788.

114. MANDAMUS — Teacher Entitled to Certificate.—Where the county board of examiners have graded a teacher, *mandamus* will lie to compel the issuance of certificate of the grade to which she is entitled.—Northington v. Sublette, Ky., 69 S. W. Rep. 1076.

115 MASTER AND SERVANT — Assumption of Risk.—Servant held not to have assumed risk of a train backing on a switch at an unreasonable rate of speed.—Carroll v. New York, N. H. & H. R. R., Mass., 65 N. E. Rep. 69.

116. MASTER AND SERVANT — Assumption of Risk —A servant, while relieved from assumption of risk by promise of the master to remedy a defect in a machine, is not relieved from exercising care for his own safety —Reiser v. Southern Planing Mill & Lumber Co., Ky , 69 S W. Rep. 1085.

117. MASTER AND SERVANT — Injury to Employer. — In an action against a railway company for the death of a fireman, decedent's consent to a violation of the rules of the company as to the operation of its trains held not to constitute negligence *per se*.—Gulf, C & S. F. Ry. Co. v. Cornell, Tex., 69 S. W. Rep. 980.

118 MASTER AND SERVANT — Injury to Miner.—In an action for injuries to a miner by premature explosion, the question whether, in his opinion, the fuse used at the time was similar to fuses previously furnished, held admissible.—Hedlun v. Holy Terror Min. Co . S. Dak., 92 N. W. Rep 31.

119. MINES AND MINERALS—Royalties on Ore Mined.—Contract to pay royalties on the product of certain mines during a term of years held to bind the owner to operate such mines with reasonable diligence during the term.—Sharp v Behr, U S. C. C., E. D. Pa., 117 Fed. Rep. 864.

120. MORTGAGES — Oral Agreement.—In a suit against grantees of realty to foreclose, and recover a personal judgment of mortgage notes given by defendant's grantor it is competent to show that grantees orally assumed the mortgage.—Bossingham v. Syck, Iowa, 91 N. W. Rep. 1047.

121. MUNICIPAL CORPORATIONS—Hearing on Street Improvements. — Six days' notice to the property owners affected of the public hearing as to a proposed street improvement held sufficient.—Field v City of Chicago, Ill., 64 N. E. Rep. 840.

122. MUNICIPAL CORPORATIONS—Obstructions.—A tree standing within a sidewalk held subject to removal by the city.—Hildrup v. Town of Windfall City, Ind., 64 N. E. Rep. 942.

123. MUNICIPAL CORPORATIONS — Registering Special Tax Bills. — A statute requiring special tax bills to be registered by the city clerk held directory only, and failure to register did not affect the validity of the tax.—Field v. Barber Asphalt Pav. Co., U. S. C. C., W. D. Mo., 117 Fed. Rep. 925.

124. MUNICIPAL CORPORATIONS—Street Improvement.—A contract with a city for street improvements, which provided for payment only out of the collection of special assessments, held to create no liability in the city on assumpsit.—Farrell v. City of Chicago, Ill., 65 N. E. Rep. 103.

125. MUNICIPAL CORPORATIONS—Street Improvements. —Contract for street improvement held not invalid because of specifications requiring bidders to observe provisions of labor law, a part of which were unconstitutional. — People v. Featherstonhaugh, N. Y., 64 N. E. Rep. 802.

126. NEGLIGENCE — Child Under Seven.—A child under the age of seven years is incapable of contributory negligence. — Illinois Cent. R. Co. v. Jernigan, Ill., 65 N. E. Rep. 88.

127. NEGLIGENCE — Fellow-Servant. — Negligence of plaintiff's fellow-servant does not prevent recovery of one, also negligent, who was not their master.—St. Louis Nat. Stockyards v. Godfrey, Ill., 65 N. E. Rep. 90.

128. NEGLIGENCE—Water Reservoirs. — Though a city water reservoir was so constructed that children could enter, there could be no recovery for the death of a child drowned therein.—Peninsular Trust Co. v. City of Grand Rapids, Mich., 92 N. W. Rep. 38.

129. NEW TRIAL — Discretion. — Allowing new trial, because plaintiff was prevented by sickness of his child from preparing his case, held not an abuse of discretion. —Jackson v. Shapard, Ky., 69 S. W. Rep. 954.

130. NUISANCE — Blacksmith Shop.—A blacksmith shop is not a nuisance *per se*.—Marrs v. Fiddler, Ky., 69 S. W Rep. 953.

131. OFFICERS—Term of Office. — Under Const. art. 16, § 17, an officer whose resignation has been accepted, but whose successor has not been appointed, is still such officer.—Keen v. Featherson, Tex., 69 S. W. Rep. 983.

132. PARTITION—Removal of Commissioners.—A statement, in a motion to remove commissioners in partition, that they were not residents and were not "supposed to have" an adequate knowledge of land values in the neighborhood, was not sufficient cause for the removal.—Donaldson v. Duncan, Ill., 65 N. E. Rep. 146.

133. PARTNERSHIP — Limitations. — Limitations do not run, as against the right of a creditor of a partnership to sue the surviving partners, during the settlement of the partnership estate in the probate court.—Brigham-Hopkins Co. v. Gross, Wash., 70 Pac. Rep. 480.

134. PHYSICIANS AND SURGEONS — Lack of Skill.—The mere fact that the result of a patient's treatment "is as good as is usually obtained in like cases similarly situated" will not preclude a recovery by the patient against the physician for negligence and lack of skill.—Burk v. Foster, Ky., 69 S. W. Rep. 1096.

135. PHYSICIAN AND SURGEONS — Licenses. — Under Code, § 700, giving cities and towns power to license and tax "itinerant doctors, itinerant physicians and surgeons" a city had no power to require a "dental surgeon" to obtain license.—City of Cherokee v. Perkins, Iowa, 92 N. W. Rep. 68.

136. PHYSICIANS AND SURGEONS—Magnetic Healers.—Burns' Rev. St. 1901, §§ 7318-7323e, regulating the practice of medicine, held not invalid because it includes osteopaths and excludes magnetic healers. — Parks v. State, Ind., 64 N. E. Rep. 862.

137. PLEADING—Defense not Pleaded. — A trial court is not warranted in directing a verdict for defendant upon a ground not put in issue by the pleadings nor litigated by by the parties. — Castle v. Persons, U. S. C. C. of App., Eighth Circuit, 117 Fed. Rep. 845.

138. PLEADING—Demurrer.—The leaving of dates blank in a bill is not ground for demurrer, but for motion to make more specific. — Smelser v. Pugh, Ind., 64 N. E. Rep. 943.

139. POST OFFICE — Liability of Railroad.—A railway company is not liable to the addressee of mail lost through its negligence, even if its duty to the public in carrying of mail be regarded as ministerial.—Boston Ins. Co. v. Chicago, R. I. & P. R. Co., Iowa, 92 N. W. Rep. 88.

140. PRINCIPAL AND SURETY — Release of Sureties.—Where a creditor accepts new interest notes for a fixed period on agreement to extend the loan, it discharges a nonassenting surety.—Steele v. Johnson, Mo., 69 S. W. Rep 1065.

141. PUBLIC IMPROVEMENTS — Special Fund.—A village has power to limit its liability by contract to pay for work done out of the special fund created for such purpose.—Village of Park Ridge v. Robinson, Ill., 65 N. E. Rep. 104.

142. RAILROADS — Condition of Crossing.—A statute requiring a train to sound the whistle at least 60 rods before reaching a crossing held not to abrogate the common-law duty resting on a railway company —Kinyon v. Chicago & N. W. Ry. Co., Iowa, 92 N. W. Rep. 40.

143. RECEIVERS — Account.—On settlement of the account of a receiver, it is not necessary that the court should make formal findings separate from the order approving or disapproving the account.—Rochat v. Gee, Cal., 70 Pac. Rep. 478.

144. RECEIVERS—Disposition of Deposit to Procure Resale.—A mortgagee, purchasing the mortgaged property at a receiver's sale and resale, held entitled to balance of amount deposited by junior creditors obtaining an order for the resale after payment of the costs and expenses.—Bass v. McDonald, Ind., 64 N. E. Rep. 934.

145. REFERENCE — Accounting.—In common-law action by executor or administrator, compulsory reference permitted when examination of long question is involved.—Malone v. Sts. Peter & Paul's Church, N. Y., 64 N. E. Rep. 961.

146. REFORMATION OF INSTRUMENTS — Mutual Mistake. —A contract may be reformed for mutual mistake, though a party neglected to read it.—Smelser v. Pugh, Ind., 64 N E. Rep. 943.

147. RELEASE—Contract of Employment.—A contract to give employment for an indefinite time in consideration of a release of claim for damages held sufficient consideration therefor.—Carroll v. Missouri, K. & T. Ry. Co. of Texas, Tex., 67 S. W. Rep. 1004.

148. REPLEVIN — Counterclaim.—Where, in replevin for property sold to defendant on credit, he mistakenly alleged certain items as a counterclaim which were properly allowable as payments, there was no error in allowing proof of such items.—Story & Clark Piano Co. v. Gibbons, Mo., 70 S. W. Rep. 168.

149. SALES — Defects in Machine.—Where a buyer of machine agreed to notify the seller of defects within ten days, and he used the machine for two years without complaint, he could not defend an action for the price on the ground of defects.—Frick Co. v. Morgan, Ky., 66 S. W. Rep. 1072.

150. SALES — Evidence.—A telegram having been introduced in evidence without objection, it was not error to permit the introduction of evidence to identify the subject-matter thereof.—Elfring v. New Birdsall Co., S. Dak., 92 N. W. Rep. 29.

151. SALES—Posted Notice Administrative Sale.—A sale of a decedent's realty will not be set aside for failure of the posted notice, otherwise sufficient, to contain the signature of the commissioner.—Allsop v. Deposit Bank, Ky., 69 S. W. Rep. 1102.

152. TAXATION—Tax Collector's Account.—Settlement of a tax collector's account, allowing certain commissions for back taxes by the county court, held conclusive, in the absence of fraud or mistake.—State, *ex rel.*, Shannon County v. Hawkins, Mo., 70 S. W. Rep. 119.

153. TAXATION—Transfer Tax.—Law requiring transfer tax on succession of life tenant held constitutional.—*In re* Brez's Estate, N. Y., 64 N. E. Rep. 958.

154. TRIAL — Harmless Error.—Where an instruction assumes to recite facts necessary for recovery, but omits an issue, the error is not prejudicial, if such issue is clearly covered by another instruction. — Burton v. American Guaranty Fund Mut. Fire Ins Co., Mo., 70 S. W. Rep. 172.

155. TURNPIKES AND TOLL ROADS—Defective Culverts.—A turnpike company held liable for injury from a defective culvert, crossing its highway and constructed by it.—Monticello & B. Turnpike Road Co. v. Jones, Ky., 69 S. W. Rep. 1073.

156. USURY — Application of Payment. — Where a debt carries a greater rate than legal interest, payments will be applied first to legal interest and then to the principal —Crenshaw v. Duff's Exr., Ky., 69 S. W. Rep. 962.

157. WAREHOUSEMEN—Bond.—Under Code Tenn. § 3381 (1880a) 2597, held, that where a warehouseman gives a bond, and then moves his business to another warehouse, it is not necessary for him to give a new bond.—Bailey v. Wood, Ky., 69 S. W. Rep. 1103.

158. WILLS—Contest.—Where the record of a proceeding admitting a will to probate shows that the court has jurisdiction, and all the facts necessary to show *prima facie* a valid will, the burden is on the plaintiffs in a contest to show facts invalidating the will. — Higgins v. Nethery, Wash., 70 Pac. Rep. 489.

159. WITNESSES—Competency.—Violence before marriage held not within the exception to Pen. Code, § 1322, making husband and wife incompetent to testify against each other in a criminal case.—People v. Curiale, Cal., 70 Pac. Rep. 468.